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BY
F. P. WALTON, ESQ., K.C. (QUEBEC), LL.D.

“ *Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῃ καὶ τὸ χρήσιμον.*”—ARIST. *Pol.* II. 1.

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TORT LIABILITY OF THE STATE.

[*Contributed by* EDWIN M. BORCHARD, ESQ., *Professor of Law, Yale University.*]

The Anglo-American Maxims.—Within the past few years both England and the United States have witnessed legislative movements designed to make the Government suable for the torts of its officers and employees. While on the Continent these efforts are regarded as a belated recognition of a self-evident obligation, for the Anglo-American mind they constitute something of a legal revolution. So firmly entrenched had become the tradition of State immunity in tort, that reasons for it were either no longer advanced or else were beclouded in such vague postulates as "sovereignty," the "King can do no wrong" and the "State is above the law."

But whatever explanation, historical or unhistorical, may have justified the English Crown in asserting and obtaining immunity in tort, no such monarchical aids could legitimately be invoked by American courts. Indeed, in the first great case on the question that came before the United States Supreme Court, *Chisholm* v. *Georgia* (1793) 2 Dall. 419, that Court held that the supposed grounds of immunity of a State from suit were without application in the United States, and that a State could be sued by a citizen of another State in the federal courts. This created consternation in the States, which were heavily in debt after the Revolution and feared that payment might be judicially exacted. To overcome the effect of *Chisholm* v. *Georgia,* the Eleventh Amendment to the Constitution was adopted prohibiting suit by a citizen of another State against a State in the federal courts. With this set-back to democratic notions of responsible government there came a great revival of political metaphysics, and the American courts outdid those of England in emphasizing the validity and immutability of the antiquated maxims, even adding new alleged grounds of expediency purporting to explain why the government should not be suable in tort. So when some of the States, moved by modern developments in governmental activity, sought by statute to waive immunity from suit at the hands of individuals, certain courts still insisted that liability in tort was excluded.

Continental Conceptions.—On the Continent they began from different premises. Steeped in juristic conceptions of corporateness, they construed legislative silence as the equivalent of consent to suit. The Anglo-American world adopted a rule of jurisdictional immunity; the Continent did not. The Continent thus escaped the feudal rationalization of supposed sovereign immunity from suit which occupied the English and American courts. On the Continent governmental authorities were concerned with the question how far public policy and social theory require that the State and other public corporations shall assume responsibility for the injuries inflicted by their agents on private individuals.

Protection of the Individual against the Group.—With the weakening of the moral props of irresponsibility—royal prerogative, divine right, sovereign infallibility—there came into being in the eighteenth century two important political factors —the constitutional recognition of certain rights of the individual and the broadening activity of the State. The protection of the security of the individual against other individuals had long been recognized as a major function of government; but it was only in comparatively modern times that it was admitted that security against the group and the State itself is of equal importance to the individual. Political and limited judicial guaranties had long been known in England; but it has up to the present time been assumed in England and the United States that pecuniary protection against invasion of private rights on the part of officials was adequately secured by conferring a right of action under limited circumstances against the officer. The suability of municipal corporations for injuries inflicted in the conduct of "corporate" activities, though sound, is not recognized as applicable to the State as a whole, and is limited by the artificial distinction between "corporate" and "governmental" activities. Thus, in actual practice in Anglo-American law, the individual is left to bear almost all the risks of a defective, negligent, perverse or erroneous administration of the State's functions, an unjust burden which has become graver and more frequent as the State's activities have become more diversified, and as we have left to administrative officers in ever greater degree the determination of the legal relations of the individual. The individual cannot be guaranteed against all errors or defects in administration, for life in an organized community entails some sacrifices and risks. But the more flagrant invasions of private rights resulting from the torts of officers should not be allowed to rest, as they now generally do, in practice, if not in theory, at the door of the injured citizen alone.

The Continent, and indeed most of the British Dominions, long recognized this fact. The concern of the statesman there was with the scope and extent of the obligation the State should assume; the concern of the jurist was with the legal explanation. It was conceded by everyone that for highly important governmental acts, such as legislation, judicial decisions and exceptional executive determinations, State responsibility for error or injury cannot be assumed. But the reason is to be found, not in political shibboleths, but in considerations of expediency. Even within the fields just mentioned the continental courts have sought to discover an administrative act within the broader State function, and, apart from legislation, have thus made inroads on the area of irresponsibility.

Legal Theories of State Liability.—The jurists had a harder time in formulating a satisfactory explanation, and there never has been complete agreement on the theories supporting State responsibility. They had been familiar with suits against the State in "corporate" matters, in contract and property relations. In property relations, unlawful acts of officers imposed liability, under the rules of the civil code making a principal liable for the acts of his agent. But with the institution of eminent domain before them, requiring compensation for formal lawful acts imposing disproportionate sacrifice on the individual, questions began to be raised as to the validity and rigidity of the classical distinctions between "corporate" or non-sovereign acts, on the one hand, and so-called "governmental" or sovereign acts, on the other; doubts were raised as to the propriety of the distinction between acts lawful and unlawful, commanded and uncommanded, contractual and tortious. If the individual sustained an undue burden or loss at the hands of the governmental machine, it seemed to many that the community rather than the individual should bear it. Individualists and Socialists agreed on that. Thus it happened, mainly in the last generation, that legislatures and jurists began to break down traditional classifications, and to regard at least the administrative activities of the State as subject to approximately the same legal rules and judicial control in behalf of injured individuals as might be the activities of any other corporation.

The courts and jurists of the early nineteenth century found an adequate explanation for this conclusion in the customary rules of private law. By characterizing the officer as an agent and the State or government or group as the principal—not an unnatural view—rules of private law readily supplied a theory of governmental responsibility for wrongful acts of the officer—either an implied negligence in selection or supervision, or the principal's guaranty of the good conduct of his agent, or the rule which imposes automatic vicarious responsibility based on identification or representation. The theory of agency underlies the proposed English and American legislative reform, presently to be described.

The supposed inadequacy of the private law theories was suggested by those courts and writers who had become impressed with the intrinsic validity of the classical distinction between "corporate" and "governmental" acts. While private law conceptions were deemed sufficient for "corporate" acts, they were deemed insufficient for "governmental" acts. Responsibility for the latter, indeed, usually depended upon express legislation. These views, based upon "public law" explanations, were strengthened by the decision of the French court in the celebrated *Blanco* case holding that responsibility could not be based on any general rule, but found its explanation in the equitable reconciliation of the interests of the State and of the individual; and as the courts began to assess damages upon the State for many injuries, such as stray shots by policemen and explosions of munitions, without proof that any officer was at fault, many jurists became convinced that the inelastic conceptions of the private law could not fit the new jurisprudence. Possibly they did the private law an injustice. At all events, innumerable legal, political and philosophical theories were advanced from many quarters to explain or rationalize the new developments. Thus, we were made acquainted with the theories of social contract, social insurance, quasi-contract, which have been either abandoned or else absorbed in the broader legal theories of "administrative fault" or "fault of the service" and governmental "assumption of risk," theories in which the individual officer's tort became either tenuous or fictional or was frankly dispensed with in the greater emphasis laid upon the operative fact of individual injury inflicted by the governmental machine. This is illustrated by the statutes in most of the countries of Europe providing for State indemnity to those innocent persons who have been erroneously convicted in the courts. The cycle from eminent domain had now been practically completed; and while the older tort theories still sustained most of the cases, the new developments concentrated attention upon the effort to find broader political and philosophical foundations to sustain this modern legal structure. So we find advanced the doctrines of "equality of burdens" or equal protection of the laws, of "vested rights," of "equity" and of "special sacrifice" regardless of tort—all of which are designed to demonstrate that special sacrifices imposed upon or borne by the individual in the pursuit of the common aim, the administration of the public service, should be spread over the community as a whole, instead of resting, as they generally do in Anglo-American practice, solely upon the injured individual. The proposed legislation in England and the United States is more narrowly limited to injuries arising out of the provable torts of officers or employees of the government, except as the English legislation contemplates a general reform in the procedure for suing the Crown.

Proposed Crown Proceedings Act.—The proposed English Crown Proceedings Act, presented in 1927 by a Committee appointed by the Lord Chancellor (Cd. 2842), involves a revision and amendment of the law governing proceedings by and against the Crown. From the point of view of present interest, its most striking features are the proposed repeal of the Petition of Right Act, 1860, the liability of the Crown in tort, and the provisions governing procedure. Suits against the Crown are, under the Act, to be assimilated, so far as possible, to suits against subjects. No longer would suits, whether in tort or in contract, be dependent upon His Majesty's fiat that right be done. No longer would the courts of England have to find that doubtful line of division between acts of the Crown, which covered with the mantle of immunity the official agents of the Crown, and tortious non-governmental or "corporate" acts of the individual officer or body, which were not protected by the shield of the Crown. This separation has resulted practically in limiting the recourse of the injured subject, even where he could sue, to an action against subordinate and often irresponsible minor officials.

Federal Tort Claims Bill.—The Federal Tort Claims Bill, which passed the House of Representatives and the Senate of the

United States on March 2, 1929 (H.R. 9285, 70th Cong. 2d. sess.), but which was vetoed by the President for reasons presently to be mentioned, is confined solely to proceedings against the government in tort. Suit in contract in the United States District Court and the Court of Claims had long been known; to this has now been added an admission of liability for damage to private property up to $50,000 caused by the "negligence or wrongful act or omission of any officer or employee of the government within the scope of his office or employment." The proposed liability of the Crown covers "any wrongful act done, or any neglect or default committed, by an officer of the Crown." The United States Bill above mentioned provides separate liability and procedure for personal injuries arising out of tort, the measure of liability being limited to $7,500.

It was the procedural provisions of this Bill which presumably brought about the presidential veto. Instead of permitting a regular suit in the courts, as does the English Bill, the United States Bill, as changed by the Senate, provided for an administrative proceeding, in property cases, before the General Accounting Office of the Comptroller General, with review by certiorari to the Court of Claims; Congress, however, reserving the privilege, before making an appropriation, to consider the report and finding of the Comptroller General and to reject it, if desired. In the case of personal injury, the United States Employees' Compensation Commission is empowered to consider the claim and make a recommendation to the Comptroller General, who may settle the claim. No review is provided for, except that Congress may examine the evidence and reject the settlement. The Attorney General protested against that provision of the Bill which enabled the Comptroller General first to determine the validity of the claim and then to appear in the Court of Claims, instead of the Attorney General, as is usual, to defend the settlement he had made. The Comptroller General is thus first a judge and then a party, and this inconsistency is supposed to have brought about the presidential veto.

English and American Bills Compared.—In nearly every respect, the United States Bill, in its latest form, is inferior to the English Bill. The English proceeding is entirely judicial, the amount of liability is unlimited, and the procedure is assimilated to that prevailing in ordinary actions. The American proceeding is administrative, the amount of liability is limited, and the procedure is different from that prevailing in ordinary actions. In defence of the American Congress, it may be said that they conceived the proposed statute as a means of relieving an over-burdened Committee on Claims of House and Senate from the task of considering small claims—the prevailing method of determining all tort claims—and as a means of establishing ancillary agencies to aid Congress in passing on the validity of claims. Thus, final control of all tort claims under the Bill is left in Congress. The English Bill, and the Bill originally drafted for Congress, proceed from a different point of view. It is there recognized that the admission of tort liability is not a matter of grace and favour, to be determined by legislative bodies, but is an individual right and ought hence to be determined by the courts. The English Bill and the original Bill in Congress thus sought to make the procedure in contract and in tort claims as nearly identical as possible.

In recent years Congress has shown a growing disposition to authorize suit in tort against the United States or to provide administrative machinery for determining liability under customary rules of law. In 1910 suits for patent infringement were permitted. Since 1900 special statutes have been passed with increasing frequency appropriating funds to compensate for tort injuries or referring such claims to the Court of Claims. In 1916 a Federal Employers' Liability Act was passed to provide compensation for the disability or death of a federal employee "resulting from a personal injury sustained while in the performance of duty." In taking over the railroads and certain collateral services during the war, and in establishing a Shipping Board for the operation of government merchant ships, the government placed itself, in respect of legal responsibility, in the position of a private operator. In 1925 an Act was passed authorizing suit against the United States for damage caused by and salvage service rendered to public vessels of the United States, with the usual shipowner's limitation of liability to the value of the vessel, a provision also found in the Crown Proceedings Bill. Congress has also passed a number of statutes, mainly since the war, conferring a limited administrative jurisdiction on the heads of the various Executive Departments to settle claims for tort injuries arising in their respective Departments. The principal statute was the general Act of December 28, 1922, granting such jurisdiction over claims for damage to property not over $1,000 in amount. Final review was left in Congress. This was a limited recognition of the validity of the principle.

Claims over $1,000 were pressed, as heretofore, upon Congress—a political, and not a legal, channel. The history of claims against the United States discloses a gradual transfer of claims by Congress from the political to legal channels—first in contract cases, then in small tort and special types of tort claims, like patent and admiralty. The proposed Federal Tort Claims Bill is a further exemplification of the policy.

In the Bill as it first passed the House of Representatives, without a dissenting vote, on June 10, 1926 (Sen. 1912, 69th Cong.), jurisdiction was given to the heads of the Executive Departments and independent establishments to settle small claims, now increased to $5,000, with final power of review in Congress. This followed the model of the 1922 Act. On claims from $5,000 to $10,000 jurisdiction was given to the United States District Courts and the Court of Claims concurrently, and on claims above $10,000 to the Court of Claims exclusively. There was no limitation on the amount of property damage recoverable. A desire not to overburden the courts with small claims accounts for the submission of claims under $5,000 to the Executive Departments, though it might be better to enlarge the Court of Claims so as to enable that Court to deal with small claims also. The jurisdictional provisions for the courts followed closely the rules with respect to contract claims. These provisions the Senate changed materially, in the Bill just passed, particularly denying normal judicial relief to claimants in tort. This is unfortunate, and it may be hoped that the new Congress will improve the Bill, in line with the English Bill, so as to confer jurisdiction on the courts to decide tort claims as they now do contract claims.

Both the Crown Proceedings Bill and the Federal Tort Claims Bill except from its provisions numerous types of cases. The English Bill excepts proceedings by or against the Public Trustee, the Charity Commissioners, the Attorney General in respect to charitable trusts, the Registrar or other officers of the Land Registry, claims prohibited by the Indemnity Act, 1920, claims which would not properly have lain against the wrongdoing officer personally, claims arising out of judicial proceedings or process, claims arising out of damage to goods by customs officers, or injuries occasioned in the carriage of the mails, claims arising out of the lawful exercise of the royal prerogative, claims against His Majesty in his private capacity, criminal or prize court proceedings, claims by members of the armed forces of the Crown arising in connexion with official duties, and claims arising out of obligations, contractual or tortious, incurred by the government of any Dominion or territory under protectorate or mandate. Patent claims against the Crown are left as at present regulated under the Patent and Designs Act. Some of the excluded claims are doubtless taken care of by existing rules of law.

The Federal Tort Claims Bill excludes from the subject-matter of liability any claim arising out of the loss or miscarriage of mail matter, any claim arising out of the administration of the office of Alien Property Custodian or out of the administration of the quarantine laws, except the laws administered by the Public Health Service, and claims arising out of the activities of the government in flood control or in river and harbour work. Claims arising out of the assessment or collection of taxes and claims under the Suits in Admiralty Acts of 1920 and 1925, which are also expressly excepted, are taken care of under existing statutes.

The English Bill contemplates suits against the particular Department whose officer may be deemed responsible for the injury. The Federal Bill contemplates that the United States Government as such would be the defendant in all cases, though in the original Bill, as it passed the House, claims under $5,000 were to be laid before the particular Department or establishment at fault. The assumed difficulty of unifying the procedure under such a system was one of the considerations which induced the Senate to vest the power to pass upon claims in the Comptroller General, finally going so far as to take all power from the judicial courts.

The English Bill is very specific in outlining the procedure for suing the Crown, including rules for obtaining evidence, and for discovery against the Crown, as well as costs, which play a more important part in England than they do in the United States. The Federal Bill contains only such references to procedure as are necessary to indicate the channel through which the claim is to be introduced and to indicate, by Congressional control over the appropriation, the purely administrative nature of the relief granted. Even in the original Bill, as it passed the House, practically the only provisions governing procedure were the jurisdictional clauses, the assumption being that the courts would apply to tort claims those general rules which had been judicially developed in connexion with contract claims.

The nature of the judgment obtainable against the United

States Government in the Court of Claims or District Courts, in contract—express or implied—had long been the subject of theoretical dispute. Is Congress bound to appropriate the funds to pay the judgment, or can it decline, and is the judgment therefore not really final? Whatever the theory, the fact is that Congress has always appropriated the funds to pay judgments against the United States, so that in practice the judgments are as final as any other judgments. In tort claims, Congress evidently intended a different policy to prevail. The English Bill does not leave it in doubt that judgments against the Crown, both for damages and costs, shall be paid automatically on the issue of the necessary court orders.

In the United States, the courts had long held that only a money judgment could be granted against the United States, and no relief against the government was possible by way of injunction or specific performance or for the recovery of specific property or by way of execution of a judgment. These provisions are specifically contained in the English Bill, but except where damages are awarded, the courts are empowered to render a declaratory judgment in lieu of an injunction or a decree of specific performance or an order for the transfer of property. As a matter of fact, in the United States, where the judgment of the court in money cases merely states that the United States owes the plaintiff a specific sum, without an accompanying decree ordering payment, the judgment is in practical effect a declaratory judgment. It is strange, but true, that (apart from Mr. Justice Stone) the United States Supreme Court, as evidenced in three cases, seems to be in great confusion as to what a declaratory judgment is, regarding it apparently as the determination of a friendly academic or non-controversial expression of doubt or uncertainty, and hence not of a "case or controversy" upon which alone the judicial power is capable of acting. The fact that the Supreme Court labours under profound misapprehensions does not militate against the fact that its misconception has delayed the introduction into federal jurisprudence of this most useful form of procedure.

Another feature of the Crown Proceedings Bill which is commendable is the fact that interest runs on judgment debts against the Crown. Whether interest runs on the original obligation and is to be included in the judgment is not stated, but as the Bill is designed to place the Crown in the same position as subjects, it is assumed that exceptions with respect to interest will not be made.

This is in marked contrast to the American law where interest does not run against the government, as a general rule, unless expressly so provided by statute. The protest against this rule of American law is of long standing, but the traditional view that governments are not subject to ordinary rules of law has prevented thus far the righting of this wrong.

The United States law provides that suits against the United States by foreigners within the limited range now permitted to nationals—*i.e.* contract—are conditional upon proof that the country of which the foreigner is a citizen permits similar suits against itself by American citizens. The provision in question has not acted as a check upon suits by foreigners, because most foreign countries in respect of suits in contract, not to mention tort, are more liberal than the United States. A provision for national reciprocity as a condition of suit by foreigners is included in the Crown Proceedings Bill. No exception with respect to foreigners is made in the Federal Tort Claims Bill, so that, curiously, a foreigner could bring a tort claim, but not a contract claim, without proof of reciprocity.

In the original House Bill, contributory negligence was not to be a complete bar to recovery, but was merely to reduce or mitigate the damages. Although statutes in nearly every State in the United States have in railroad and some other cases abandoned the common law contributory negligence rule, the Senate restored that rule to the Bill, on grounds, however, that are hardly sustainable. The English Bill makes no mention of any rule on the subject, so that it is possible that the common law rule will be applied. The rule is not believed to accord with modern social conditions, and though juries have weakened its force, the rule ought to be abolished by statute.

Without regard to any particular theory of social justice, the force of circumstances has evidently compelled England and the United States to take account of the fact that losses which are sustained by the individual through the negligence or wrongful acts of government officials acting within the scope of their employment should be borne, not by the individual or in final analysis by the officer, but by the community for whom he acts, the State itself. While neither the English nor the American Bill forecloses a private action against the wrongdoing officer, such actions are likely to be rare. The American Bill expressly grants the government a privilege of regress against the officer whose wilful act has caused damage ; probably common law principles suffice to accord this privilege. While the American Bill represents but a halting beginning in the recognition by the State of an obligation which on the Continent is regarded as natural and obvious, and while the procedure for carrying the obligation into effect is unsatisfactory, it may be hoped that the new Congress will report out an improved Bill, and that future Congresses will bring American law approximately up to the standard represented by the proposed English Crown Proceedings Act, and by long-prevailing practice in France and Germany. When that time comes, we shall be more justified in accepting Dicey's boast of the "rule of law" as a bulwark of protection to the individual in his relations with the government.

LIMITATIONS ON FREE TESTAMENTARY DISPOSITION IN THE BRITISH EMPIRE.

[*Contributed by* JAMES MACKINTOSH, ESQ., B.A., *Barrister-at-law.*]

BY the introduction in the House of Lords of the Wills and Intestacies (Family Maintenance) Bill, Lord Astor has opened a debate on how far a testator should be allowed to decide for himself who is to enjoy his property after his death. On this subject there are at present two contrasting lines of thought in the Empire.

The idea that a testator's widow and children have rights to a definite share in his property was rooted in the legal systems of Scotland, of the Provinces of the Union of South Africa and of Quebec. In South Africa the modern demand for freedom in the transfer of property has led to a series of statutes establishing the freedom of testamentary disposition.[1] In Scotland and Quebec, when drafting marriage contracts, conveyancers usually exclude the old-established rights of widows and children. In all three the tendency is towards greater freedom of disposition by will than existed in the past. But in the more recently developed Dominions, such as New Zealand and Australia, the law had no remnants of an antique reverence for family rights, and gave a testator freedom to leave his property as he pleased. This freedom is most likely to lead to hardship when the parties to a marriage cannot afford the expense of a marriage settlement. In these rapidly developing Dominions, where many made a considerable fortune from small beginnings, there were a number of scandalous cases in which men who died comparatively wealthy left their widows and children unprovided for. Indignation at injustice and exasperation at the burden of maintaining the dependents of the well-to-do being thrown upon the community, led to the passing throughout Australasia of a series of Testator's Family Maintenance Acts. These Acts gave the courts power in certain circumstances to provide out of a testator's estate for the adequate maintenance of a widower, widow, or child unprovided or inadequately provided for in the will.

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[1] Cape, Act No. 23 of 1874; Natal, Law No. 22 of 1863 and Law No. 7 of 1885; O.F.S., Law Book, 1901, Cap. XCII.; Transvaal, Procl. No. 28 of 1902, ss. 126–9.

Altogether it appears: (*a*) That in those parts of the Empire where definite limitations on the freedom of testamentary disposition have long existed, the tendency is towards greater freedom of disposition; (*b*) that in those parts which have enjoyed complete freedom of disposition in the past, the legislature has tended to entrust the courts with a duty to check improper use of that freedom.

Even where the trend of legislation or of legal practice is towards greater freedom of disposition by will, a testator seldom has the power which he enjoys in England of leaving his family penniless. In South Africa, Scotland and Quebec a certain provision is secured by law for the widow or children of the marriage or for both. This provision may be excluded by marriage contract, but such a contract in practice always contains some alternative provision for the family.

South Africa.—Thus the power of free testamentary disposition established by statute in South Africa is restricted in its effects by the doctrine that community of goods exists between the parties to a marriage unless it has been excluded by the marriage contract.

"The effect" of this community, writes Professor Lee, "is to create a joint fund . . . consisting with some exceptions of all the property of both the spouses, as well existing at the time of the conclusion of the marriage as after acquired." Community "persists during marriage and ends upon its dissolution. Thereupon the common fund is divided *ipso jure* into two equal shares, one of which vests in the surviving spouse, . . . the other of which vests in the testamentary or intestate successors of the deceased."[1]

Where community exists, therefore, a testator can only exercise his powers of disposition by will over one half of the common fund. The other half vests in the surviving wife or husband.

Scotland and the Province of Quebec.—In Scotland and in the Province of Quebec the definite rights in the estate of a deceased husband, which (quite apart from any community of goods) were given by ancient custom to his widow and surviving children, have not been substantially interfered with by modern legislation.

Terce and Jus Relictæ.—In Scotland a widow is entitled to *terce* and to *jus relictæ*.[2] *Terce* is her right to a life-rent in one-third of the heritage (or realty) in which the husband had a substantial right of property at his death. *Jus relictæ* is her right to one-half of her husband's moveable property if there are no children surviving; to one-third of such property if there are such children.

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[1] Lee, *Introduction to Roman-Dutch Law* (2nd Edit.), pp. 65, 66.

[2] An account of these rights is given in the following works: M'Laren, *Wills and Succession* (3rd Ed.), vol. i, p. 116; Fraser, *Husband and Wife* (2nd Ed.), vol. ii, p. 1058; Walton, *Husband and Wife* (2nd Ed.), pp. 205 and 216; Gloag and Henderson, *Introduction to the Law of Scotland*, p. 448.

In Scotland, though not in Quebec, a widower has his rights as well as a widow. Courtesy gives him a life-rent in his wife's heritage. *Jus relicti* is a statutory right, which exactly corresponds to the widow's ancient right of *jus relictæ*.[1]

Legitim.—And lastly in Scots law the children of a marriage have *legitim*. This is a right to one-third of their father's or of their mother's moveables, if the other parent is surviving; to half of these moveables if there is no surviving parent. *Legitim* is divided equally among all the surviving children of a deceased parent, who have neither discharged nor renounced their claim to it. It is almost invariably excluded if there is a marriage contract.

Dower.—In the same way the rights of dower established by the Civil Code of Quebec in favour of a man's widow and surviving children are often varied or excluded in practice. These rights of dower supplement the provisions of the Code which provide for community of goods between husband and wife.[2] By art. 1260 of the Code, in the absence of any covenant or stipulation to the contrary, the parties to a marriage are presumed to agree to legal community and customary dower. Under the regime of legal community, which is very similar to the community of goods under South African law, certain property of the consorts is regarded and administered as a common fund. The community is dissolved by death or separation.[3] At its dissolution the debts of the community are paid out of this fund, which is then ordinarily divided equally among the consorts or their representatives.[4] The immoveable property of the husband at the date of the marriage and any such property which he acquires during the marriage from his father or mother or other ascendants, is not included in the community.[5] It is precisely this immoveable property of the husband that is subject to customary dower.[6] Altogether under the Civil Code a widow, in the absence of any stipulation to the contrary in the marriage contract, is entitled at her husband's death: (*a*) To her half-share in the common fund of the community; (*b*) to customary dower which is a usufruct of one-half of the immoveable property of her husband not included in the community.[1]

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[1] Married Women's Property (Scotland) Act, 1881, s. 6.

[2] Dower in favour of a widow also exists in Ontario. The Devolution of Estates Act, R.S.O. 1914, ch. 119, s. 9 (1).

[3] Civil Code, art. 1310. [4] *Ibid.*, arts. 1354–78. [5] *Ibid.*, arts. 1272, 1275.

[6] Mignault, *Droit Civil Canadien*, vol. vi, p. 414.

As well as the widow's dower there is the customary dower of the children of the marriage, which is a right not of usufruct but of ownership. At the death of their mother the half of the immoveable property of their dead father which was subject to her dower is divided among the surviving children of the marriage.[2]

Points in Common in Scots Law and the Civil Code of Quebec.—The rights established by Scots law in favour of the wife and children of a marriage and the dower given by the Civil Code of Quebec have many points in common.

(i) A definite share in the husband's property is reserved for the wife and children in each case.

(ii) Both groups of family rights are established by the mere fact of marriage.[3] In Scotland they are regarded as rights under the general law. In Quebec the consorts are presumed to have entered into an agreement for customary dower in favour of the wife and of the children to be born of the marriage.

(iii) Both in Scotland and in Quebec these rights may be excluded or varied by an ante-nuptial marriage contract.[4]

(iv) If these family rights have not been excluded by the marriage contract, they cannot be excluded or varied by any will or *donatio mortis causa*. Thus in Scotland a deed which purports to divest the grantor, but really leaves him in enjoyment of his property, may be cancelled as in fraud of *jus relictæ*.[5]

(v) These rights are all contingent. If a wife predeceases her husband, she loses her *terce* and *jus relictæ*, her dower in Quebec.[6] If the children of the marriage predecease a parent they lose all rights of *legitim* or of dower in the estate of that parent.

Difference between Scots Law and the Code.—But there is one fundamental difference, which leads to important differences in practice, between customary dower under the Code and the corresponding rights under Scots law. In Scotland the family has rights only in the property which the spouse or parent owns at death. These rights attach only to the estate left after all debts have been paid.[1] Claims based on these rights are in the nature of debts due from the estate of the deceased [2] and as such have priority over testamentary dispositions. But they are not only unsecured debts, but debts whose payment is delayed until the unsecured creditors have been paid. The liability to dower is very different. Dower cannot be enjoyed until the husband or father is dead and the claim to dower depends upon surviving him. But the contingent liability for dower attaches to the immoveable property of the husband at the date of the marriage, or, if he succeeds to it after marriage, at the date of its acquisition.[3] Though under art. 2116 lands subject to dower must be registered, if registration is in order no alienation or mortgage by the husband and no execution or judgment against the property can affect the rights of the wife and children.[4]

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[1] Civil Code, arts. 1427, 1434.

[2] *Ibid.*, arts. 1427, 1434, 1439.

[3] *Ibid.*, arts. 1260, 1427.

[4] M'Laren on Wills, vol. i, p. 136; Civil Code, art. 1263.

[5] Fraser on Husband and Wife, vol. ii, p. 1000; *Lashley* v. *Hogg*, [1804], 4 Pat. 581.

[6] Civil Code, arts. 1438, 1439.

It follows that the transfer of land is far less hampered by family rights and that these rights are more easily defeated in Scotland than in Quebec. In Scotland since a wife's claim to *terce* attaches only at her husband's death land can be sold freely during his lifetime without any regard to her *terce*. In Quebec the contingent liability to dower attaches to land at the date of the marriage. Unless the wife renounces all her rights against a piece of land it will be impossible, perhaps for forty years, to convey that piece free from her claim to dower.[5] This claim may or may not materialize and its burden is impossible to estimate. In Scotland again a spouse or parent can defeat the claims of his family by a settlement of his property *inter vivos*, although he reserves a life interest to himself.[6] In Quebec the family claims can only be lost by a renunciation made when there is a sale of property for value, and all renunciations are looked upon with suspicion by the court.[7]

Effect of Law in Scotland, Quebec and South Africa.—On the whole the practical effect of the law in Scotland, Quebec and South Africa is to provide that a man shall not be able to deprive his family of proper maintenance merely by the terms of his will. Certain provisions are made for the family by law. These can only be excluded by the marriage contract or by consent. It is true that in practice these provisions are often excluded in the marriage contract, but it is also generally admitted that almost all cases where real hardship has been caused by an unjust will have been cases in which there was no marriage contract.

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[1] *Naismith* v. *Boyes* [1899], 1 F. (H.L.), 69.

[2] Gloag and Henderson; Introduction, p. 448.

[3] Civil Code, arts. 1433, 1434, 1443. [4] *Ibid.*, art. 1447. [5] *Ibid.*, arts. 1444–6.

[6] *Collie* v. *Piries Trusts* [1851], 13 D. 506.

[7] Mignault, *Droit Civil Canadien*, vi, p. 432.

Method adopted in other Parts of the Empire.—In other parts of the Empire the method has been developed of giving a court power to interfere where a testator's family is suffering hardship through the operation of his will. This method was first introduced in New Zealand by the Testator's Family Maintenance Act, 1900. Since that time it has been applied in varying forms in Australia and Canada. The following statutes, which bear at least some relation to the original New Zealand Act, are now in force: *New Zealand*, The Family Protection Act, 1908, ss. 32–36, as amended by The Family Protection (Amendment) Act, 1922; *New South Wales*, The Testator's Family Maintenance and Guardianship of Infants Act, 1916; *Victoria*, The Administration and Probate Act, 1915, ss. 108–17. *South Australia*, The Testator's Family Maintenance Act, 1918; *Queensland*, The Testator's Family Maintenance Act, 1914; *Tasmania*, The Testator's Family Maintenance Act, 1912; The Testator's Family Maintenance (Amendment) Act, 1915; *British Columbia*, The Testator's Family Maintenance Act, 1924.

Legislation in New Zealand.—In this article I propose to deal mainly with the New Zealand statute and its interpretation by the courts.[1] I do this for two reasons. First, because it is the original statute which has been followed to a varying extent by the other statutes I have mentioned. Second, because there is a larger body of decisions upon it than upon any other statute of the kind, and those decisions have been recognized to be of assistance in the application of the other statutes.[2]

S. 33 (1) of the Family Protection Act, 1908, indicates the general nature of the New Zealand legislation and of the discretionary power which it entrusts to the Supreme Court.

> If any person (hereinafter called "the testator") dies leaving a will and without making therein adequate provision for the proper maintenance and support of the testator's wife, husband or children, the court may at its discretion, on application by or on behalf of the said wife, husband or children, order that such provision as the court thinks fit

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[1] A more full and adequate account than I can attempt of the law in New Zealand is given by S. A. Wiren at p. 378 of *The Law Quarterly Review*, July 1929.

[2] New South Wales. *In re Harris* 18 N.S.W., S.R. 303; British Columbia, *In re McAdam* [1925] 2 W.W.R. 593 at 597.

shall be made out of the estate of the testator for such wife, husband or children.[1]

In dealing with the working of all these Acts three main questions arise: (1) When does the court consider itself entitled to exercise a discretion such as the one given by s. 33 (1) of the New Zealand Act? (2) On what principles has it exercised this discretion? (3) If the court in the exercise of its discretion decides that some provision should be ordered, how is that provision to be made and who is to bear the burden of it?

(1) When will the Court exercise its Discretion?—(*a*) The application must be made by or on behalf of someone entitled to benefit under the Act. The New Zealand Act allows an application by a widower or even by an able-bodied and adult son, but in Victoria only a widow, a boy under eighteen, or a girl under twenty-one can benefit.[2]

(*b*) An application must be made within a period of time fixed by statute, if the court is to entertain it. To allow applications to be made some considerable time after a testator's death would clearly hinder the distribution of estates. In Victoria the period is within six months from the date of the grant of probate[3]; in New Zealand within twelve months from that date.[4] The other Acts all fix some such period within which applications must be made.

(*c*) In Victoria the benefit granted by the court to a widow must not exceed the sum, or the interest on the sum, to which she would have been entitled on an intestacy.[5] An application by a widow who has received the amount of her share on an intestacy will not be entertained, even if the estate is small and such a share is insufficient for her needs.[6] Under the New Zealand Act and those such as the New South Wales and British Columbia Acts which follow it most faithfully, there is no such statutory limit to relief. An application by a widow may be allowed, although she has all to which she would have been entitled on an intestacy.[1]

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[1] In addition to the statutes which follow closely on the New Zealand model the Devolution of Estates Act, 1920, ss. 24–34, in Saskatchewan, and the Widows Relief Act, 1922, in Alberta, give power to the court to give relief to a testator's widow in certain circumstances. But though in many respects these two Acts are of the New Zealand type, they do not appear to have a conception of "proper maintenance" as their central principle. Any widow can apply if she has received less than the share to which she was entitled on an intestacy, and in no circumstances can the court put her in a better position than if she had taken a share in her husband's estate on an intestacy. See *McBratney* v. *McBratney*, 59 S.C.R. 550 at 564.

[2] Administration and Probate Act, 1915, s. 108.

[3] *Ibid.*, s. 117.

[4] Family Protection Act, 1908, s. 33 (ix).

[5] Administration and Probate Act, 1915, s. 115 (ii).

[6] *In re Mashin* [1908] V.L.R. 641.

(*d*) Before exercising its discretion the court may have to decide whether an individual can surrender the right to claim under these Acts. Under the New South Wales Act it has been held that the Act is for the benefit of individuals, and that they can contract out of their claims under it.[2]

The rights given by the New Zealand Act have, however, been held to be inalienable. The Act was said to be a declaration of state policy paramount to all contracts, for its object was to save the community the cost of maintaining a testator's family, as well as to benefit the members of that family.[3]

(2) **On what Principles does the Court exercise its Discretion ?**—(*a*) The fundamental principle which has guided courts in exercising their discretion under all these Acts has been that their purpose is not to amend unfair wills, but to make provision for those who cannot maintain themselves.[4] "The court is not to recast the testator's will except so far as is strictly necessary to give adequate maintenance to the widow and children." [5]

(*b*) The question therefore arises of what is meant by "adequate maintenance." In the leading case of *Allardyce* v. *Allardyce*, 29 N.Z.L.R. 95 (affirmed [1911] A.C. 730) Stout C.J. made it clear that the New Zealand Act is something more than an Act for the relief of destitute persons. Maintenance and support mean something more than an assurance of food and clothing. *In Welsh and Mulcock* [6] Salmond J. explained that maintenance and support means "such maintenance and support as it was the moral duty of the testator, having regard to all the circumstances of the individual instance, to provide for his wife and children. The provision which the court may properly make is the provision which a just and wise father would have thought it his moral duty to make in the interests of his widow and children."

The reported cases fall into two main classes. The one class decides the priority between competing claims in a small estate; the other class decides what circumstances should be taken into

[1] *In re Harris*, 18 N.S.W., S.R. 303; *In re Schmalz* [1927] 1 W.W.R. 408.

[2] *In re T. Draper*, 23 N.S.W., S.R. 484.

[3] *Gardiner* v. *Boag* [1923] N.Z.L.R. 739 at 746. Approved *Parish* v. *Parish* [1924] N.Z.L.R. 307.

[4] *Munt* v. *Findlay*, 25 N.Z.L.R. 488.

[5] Per Salmond, J. *Welsh* v. *Mulcock* [1924] N.Z.L.R. 673 at 684.

[6] *Ibid.*

account in arriving at the proper maintenance to be allowed out of an adequate estate.[1] The main point which emerges from the first class is that in the absence of countervailing circumstances the widow's claim is paramount.[2] In connexion with the second class of cases it should be noted that all the statutes in question lay down expressly "that the court may refuse to make an order in favour of any person whose character or conduct is such as in the opinion of the court to disentitle him or her to the benefit of an order under this Act."[3] Thus an application by a widow was refused because there were good grounds for belief in her adultery, though the adultery was not strictly proved.[4] Among the many other circumstances which have been taken into account in different cases are the age and health of the applicant,[5] the size of the estate,[6] and the position in life of the testator and the applicants.[7]

(3) If Further Provision is Ordered, how is it to be made and who is to bear the Burden of it?—Although in New Zealand the court has power to order payment of either a lump sum or periodical instalments,[8] a testator's final dispositions of capital are seldom interfered with in practice. Usually the court has made an order securing to the applicant an annuity out of income. The New Zealand Act in effect provides that the court has a discretion in settling the incidence of the payments ordered.[9] The case of *Parker* v. *Carr* suggests that liability for such payments falls primarily upon residue.[10]

Practical Effect of New Zealand Legislation.—So much for the principles upon which the courts have applied the New Zealand Act and the statutes modelled upon it. Something of the practical effect of the New Zealand Act can also be gathered from the reported cases. The great number of such cases in the New Zealand Law Reports makes it clear that a considerable amount of litigation has taken place under the Family Protection Act, 1908, and its predecessors. Such litigation throws a difficult and delicate task upon the judges.[1] They have felt a certain diffidence at sitting in judgment upon the actions of a testator who cannot be heard and who must have had a fuller knowledge than a court could ever have of all the circumstances of the case.[2] The general effect of the Act has, however, been favourably summed up by Chapman J. "As the law stands, and as it has been administered, it is a law which in a very small percentage of the total number of testamentary dispositions has made a very moderate deduction from the otherwise plenary testamentary authority of the subject, but within that small percentage of instances it has afforded the appropriate remedy in a very large number of cases of injustice or inadvertence." [3]

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[1] *Allen* v. *Manchester* [1922] N.Z.L.R. 220 at 221.
[2] *E.* v. *E.*, 34 N.Z.L.R. 785.
[3] Family Protection Act, 1908, s. 33 (ii).
[4] *In re McGown* [1900] V.L.R. 153.
[5] *Nosworthy* v. *Nosworthy*, 26 N.Z.L.R., 285.
[6] *Allardyce* v. *Allardyce* (*sup.*), at p. 970.
[7] *Welsh* v. *Mulcock* [1924] N.Z.L.R. 673 at 686.
[8] Family Protection Act, 1908, s. 33 (iii.).
[9] *Ibid.*, s. 33 (iv)–(vi.).
[10] 24 N.Z.L.R. 895.

Conclusion.—Altogether the law in Scotland and in most parts of the Dominions does not allow a testator to leave all his property away from his wife and family, unless they are already provided for by a marriage contract. In Scotland, unless the family rights, such as *terce*, have been expressly excluded by the marriage contract or released during the testator's lifetime, the law guarantees to the testator's family a definite share in his property at his death. In Quebec the provisions for legal dower amount to a common form marriage settlement into which the parties are presumed to have entered. In both Scotland and Quebec a lawyer can advise, with comparative certainty, how much of his property a testator can dispose of freely by his will. In those parts of the Empire which have legislation modelled on that of New Zealand, arithmetical exactitude has been sacrificed to elasticity. In New Zealand the family of a testator has no claim to a fixed share in his estate, nor is their claim limited to any such share. A lawyer advising a testator, or a judge hearing an application, has to decide the difficult question, whether what the testator proposes to do, or what he has done, is just in all the circumstances of the case. Instead of a definite and more or less simple problem in division, the lawyer or judge has to solve the vague and complex problem of what the testator's family can claim as proper maintenance. Lord Astor's Bill seeks to combine the certainty of the one and the elasticity of the other method of preventing the misuse of testamentary power.

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[1] *Allardyce* v. *Allardyce* (*sup.*) at 973. *Cf.* In British Columbia, *In re Schmalz* [1927] 1 W.W.R. 408.

[2] *Ibid.*

[3] *Welsh* v. *Mulcock* (*sup.*).

THE "CONSEIL D'ÉTAT" IN FRANCE.[1]

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AMONG constitutional combinations, the *Conseil d'État* of France is one of the most original, and, according to the nearly unanimous opinion in France, the most favourable to good government.

English statesmen have been undoubtedly our masters in constitutional law. The ruling principle of our successive constitutions, namely, the separation of powers, was first set forth in France by Montesquieu. He got the idea from Locke's essays. Locke had taken it from Aristotle. But this rule has been applied in France differently from England.

In England it is admitted that the power of making laws belongs to Parliament, the power of putting laws into execution belongs to the king and to the judges. So, public departments, as well as private business, are under the control of the same courts of justice.

In France, ordinary justice is usually reserved (with important exceptions) for private business. Public departments are independent of the courts of justice to such an extent that some authors consider that there are not only two powers in the State, but three : legislative, executive and judicial.

We do not accept this way of analysing the facts. We teach that there are only two powers, legislative and executive ; but we add that executive power is divided into two branches : administration and justice ; and we think that justice and administration must be independent one of the other. This means that the officials whose functions are to maintain order and peace in the country, and to render us the services that we have a right to expect from the State, must not interfere with the carrying out of justice ; and reciprocally, ordinary judges must not interfere (with important and numerous exceptions) with the activity of our prefects. Let each one govern in his own domain, is the motto of our public organization.

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[1] A lecture delivered on May 30, 1929, before the Faculty of Laws of the University of London.

Probably, the importance of our *Conseil d'État* with regard to its management of public business, and the evolution of the institution itself during the nineteenth century, explains the difference between public law in our two countries. This makes the following question doubly interesting: what was exactly the primitive Council of State, and what has become of it under our successive forms of government?

The Conseil d'État of Napoleon.—The *Conseil d'État* owes its creation to Napoleon, and to the Abbé Siéyès, who suggested the reform. It is the masterpiece of the consular and afterwards of the imperial government. During the reign of Louis XIV there existed an institution bearing the same name, but not having the same rôle. The royal Council of State might be consulted by the king on important political matters, as is the case to-day, if I am not mistaken, with the Privy Council in England.

The chief business of Napoleon's *Conseil d'État* was the preparation of laws.

The government undertook to make written laws in accordance with the different regional customs of France. During four centuries these customs had been gradually drawn up; but, too varied and numerous, they needed to be summarized, and a greater unity being necessary, a code was universally demanded.

In those times no one thought that it was enough to have been elected to be able to make laws. People who like dainty meals seek clever cooks. Is it, then, more easy to make wise laws than to prepare delicate dishes?

Napoleon entrusted thirty picked lawyers with the preparation of the texts, only leaving to the elected *corps législatif* the right of voting (or refusing to vote), no debating being allowed. This *corps législatif* has been compared to a meeting of mutes. Our present parliament in no wise resembles it. The *Conseil d'État* alone (controlled by another council which was called *Tribunat*, and has not survived) examined, discussed, decided the proper form of the articles, and so we have old codes that everyone can easily understand. What a pity that the same cannot be said of our modern laws! The participation of the *Conseil d'État* in legislative power was only a part of its rôle. It was, besides, entrusted with the power to give the emperor advice when it was requested to do so; namely, when it was necessary to complete laws by regulations in order to make their application more easy, and also when litigations arose between citizens and public officials.[1]

Comité du Contentieux.—After 1806 this last function developed to a great extent, and requests became more and more frequent. Then, it was decided that these requests should be drawn up by a special body of barristers appointed for that purpose, called *Avocats au Conseil d'État*.

Every request was the object of a careful examination by a *Comité du Contentieux* under the presidency of the Chief Justice.

Subsequently (and, in fact, always) in conformity with the advice of the *Comité*) the emperor, by decrees, gave equitable solutions to the requests. This was the beginning of what we call *la justice administrative*.

The institution of the *Comité du Contentieux*, though not resembling the ordinary administration of justice, gave satisfaction to public opinion. It was more expeditious and less costly; the independence of the masters of the requests who counselled the emperor, as well as the regular approval by the emperor of what was suggested, appeared to be a sufficient guarantee of equity with regard to the possible abuses or mistakes of public officers.

Reforms of the Conseil d'État.—On account of the favourable attitude of the public with regard to the maintaining of this system, the *Conseil d'État*, which at the fall of the imperial government lost its legislative rôle, continued to exist as a giver of advice, especially with regard to litigations. This function was reformed and perfected during the reign of Louis-Philippe. It was agreed that it would be expedient to give the examination of litigations between citizens and officials the same guarantees as those given to private lawsuits.

It was decided that the *Avocats au Conseil* could plead before the *section du contentieux* and explain verbally, with a statement of claims and defences, the arguments already exposed in their memorials. A master of request was entrusted with the rôle of the *Ministère public*.[2] Since these reforms were made, one thing only was wanting to the *Conseil d'État* to be a perfect court of justice, the power of deciding for itself. As a matter of fact, this was wanting only in theory, the government always following in practice the advice given by the Council.

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[1] Art. 52. Const. du 22 frimaire, An viii: "*Sous la Direction du 1er Consul un Conseil d'État est chargé de rédiger les projets, plans et règlements d'administration publique et de résoudre les difficultés qui s'élèvent en matière administrative.*"

[2] There is no English equivalent for this term.

The last reform was made in 1848; the Council received the power of pronouncing judgments instead of giving advice.

This system, abandoned by Napoleon III, was re-established in 1872 and became the present *Conseil d'État*, the Supreme Court of administrative justice. The *arrêts du Conseil* have taken the place of the *décrets du contentieux.*

Composition of the present Council.—The present Council is composed of thirty-five *conseillers*, thirty-seven *maîtres des requêtes*, forty *auditeurs.*

The *conseillers* decide, the *maîtres des requêtes* and *auditeurs* prepare the judgments or the forms of advice.

The *auditeurs* are chosen by competition among the *licenciés en droit.* Three quarters of the *maîtres des requêtes* are chosen among the *auditeurs.* Two-thirds of the *conseillers* are chosen among the *maîtres des requêtes.*

That a part of the *conseillers* or *maîtres des requêtes* should be taken from outside the career cannot be criticized. The posts of which the ministers can dispose are given to superior officials (*directeurs* or *préfets*). This permits a reasonable combination of practice and theory. The places of *Conseillers d'État* are, however, so much sought after that a bad choice made by the government would cause a scandal. The control of public opinion in this matter is the best guarantee.

Removability of Conseillers d'État.—The *Conseillers d'État*, even when entrusted with rendering justice, are not irremovable. This apparent inferiority of administrative justice with regard to ordinary tribunals has its explanation in the precedents referred to above. To render justice was not among the first functions of the institution.

The *Conseillers d'État* became judges in fact by the reform of Louis-Philippe; legally, through the reforms of 1849 and 1872.

But they had already acquired so great a dignity in the State that irremoveability could not have added anything to their independence. There is no doubt that the *Conseillers d'État*, together with the *Conseillers à la Cour de Cassation*, are the most independent of the French judges, for, being in reality at the head of the hierarchy they have nothing to fear, but also nothing to expect from the government.

We affirm that the writers who, because of the removeability of the *Conseillers d'État*, have inferred that they were servile, have shown themselves to be badly informed and extremely unjust, and we regret to see among those authors one of the most able law professors of England whose works are admired in France, Professor Dicey.

Functions of the Conseillers d'État.—For working purposes, the *Conseillers d'État* are divided into sections. Four sections are engaged in answering the demands for advice of the different ministers. To these *sections administratives* belong the preparation of the *règlements d'administration publique*—*i.e.* rules and orders, which are often necessary for the application of our laws.

More interesting is the function of the two sections called *sections du contentieux.* They form the ordinary court of administrative justice, either in having the power of giving judgments, or only in preparing the judgments given by the *Assemblée du Contentieux.*

The chief fact is that this administrative court has jurisdiction on all applications, claims, complaints of everyone asserting himself to have been injured in the course of the public service.

We can obtain from the *Conseil d'État* the cancelling of all irregular acts, or of acts accomplished by officials without authority, or of acts constituting in themselves abuses or misappropriations of power.

We can obtain from the State, by judgment of the *Conseil d'État*, compensation for every damage resulting from public administration.

We can obtain modification of every administrative operation illegally accomplished. You say: "The King can do no wrong." With another meaning we can say: "The Republic can do no wrong," since every wrong caused by an administrative act entitles the victim to reparation or compensation by the *Conseil d'État.*

Erroneous Idea of French Administrative System.—I have referred to our respect for the memory of Professor Dicey. It pains me to have to temper my admiration because of Dicey's bad opinion of our administrative system; it pains me still more because of the influence that Dicey's error has had in England. Happily our institutions are, to-day, more justly appreciated. I find the proof of it in an excellent work, the title of which is *Public Authorities and Legal Liability* and the author Mr. Gleeson Robinson, with a remarkable introductory chapter by Mr. Morgan. All throughout the work is to be seen the most accurate knowledge of continental administrative law.

Nevertheless, there is a French proverb which says: *Il est des morts qu'il faut tuer* (There are corpses that must be killed);

such is the case with the prejudice existing that the French live under the domination of a despotic and irresponsible bureaucracy. Nothing is more contrary to the truth, not only in the present century, but even for more than a hundred years.

I have often spoken to my students of England as being the country where people form the highest conception of freedom.

But let me say, and let me prove, that if, as a matter of fact, we are less firmly liberal than yourselves, our legislation, compared with the English, is more satisfactory in every respect.

Professor Dicey, to whom I offered, about thirty years ago, the first edition of my *Traité de droit administratif*, said to me: "In England, there is no *droit administratif*; we do not know what it can be"; and smilingly he added: "we prefer not to know, fearing regulations which appear less as guarantees for citizens than privileges for officials." Never have I deplored my inability to make myself understood in English so much as I did then; I had to content myself with marking the pages in my book so that Professor Dicey might find the refutation of his error. Perhaps he read the passage; perhaps he was shaken in his idea. Certainly he was not convinced.

Meaning of Expression "Droit Administratif." "We have no *droit administratif*. . . ." But that is quite impossible. One cannot say that if one understands what the expression exactly means. Everywhere the government gives orders, injunctions, prohibitions to citizens. Everywhere public officials are appointed to render services to the public. Admirals, generals, sheriffs, constables, policemen, give orders; postmen, public engineers, schoolmasters, road-menders, render services. The activity of H.M.'s ministers and of all the agents in public services is never arbitrary. Every office within certain limits is competent, no official may exceed the powers he holds by the law, every official acting in his own capacity is obliged to observe special proceedings, to take prescribed precautions in prescribed delays. No one can make use of a power given in view of a determined aim for another purpose.

All these sorts of regulations, limitations, restrictions, conditions of form or of time imposed on officials in their functions have been established for the safeguard of citizens, rarely for the advantage of the services. All these rules make up the first half of administrative law. The second part, the most interesting because in that matter we find not so much details of organization as principles of justice, contains regulations of which the sole aim is to defend citizens from possible abuses, mistakes or neglect on the part of public officials.

There is a maxim in England that no man is above the law. We may infer from this rule that two men, for the same offence, should be sued before the same jurisdiction, and should be punished by similar verdicts, and that is all. I insist on this point ; two men who are guilty of the same offence. But it seems evident that the same offence cannot be ascribed to a simple citizen as to an officer acting in the sphere of his official capacity, since the simple citizen has no administrative function, no official capacity.

Abuse of Legal Authority by Officials.—At any rate, there is one case which is beyond all possible doubt ; it is when the official misuses a legal authority. How can a simple citizen be blamed for misusing power which he has never possessed ?

According to the English "rule of law," save the sovereign, every man, whether public officer, or private citizen, may be sued or prosecuted in the ordinary courts. The mere fact that a man acted in an official capacity is not a defence.

Nay, the principle of giving equal treatment to officials and private citizens is pushed much further: if a wrong has been done by a subordinate who is subject to the orders of a superior and for whose conduct that superior is politically responsible, that does not render the superior liable for damages. Mr. Lawrence Lowell, in his book on English government, gives this characteristic example. He supposes a colonel gives an order to fire on a mob : "The soldier," he says, "may conceivably have to choose between obeying and being hanged for murder, or disobeying and being court-martialled and shot. That is the risk of the business."

Who can reasonably acquiesce in such result ?

Moreover, it is admitted in England that in no case can the Crown be liable for the torts or damages occasioned by the execution of public services. "The King can do no wrong." This rule, however, is extended to the ministers, and to judges (even to the justices of the peace, and to the police officers, and to the Customs and Excise officers, and, if I am not mistaken, the majority of civil servants enjoy a considerable measure of statutory protection. In that one must recognize privilege for officials, but injustice to citizens. This does not exist in France.

The truth is that such immunity is unavoidable with regard to the judiciary functions. We cannot criticize the rule that exonerates from liability all officers employed in the search for criminals and delinquents. No profession, indeed, implies more numerous risks of committing more dangerous mistakes.

Nevertheless, no one thinks of allowing a citizen who has been wrongly prosecuted to prosecute reciprocally his prosecutor. It is admitted in England as much as in France that such risks are unavoidable. But I have just stated that similar immunity for identical reasons (chiefly for the protection of the officials) was extended in England to numerous agents in charge of administrative services.

Never, in France, has complete immunity been admitted for other officials than the members of courts and tribunals. Formerly the government of Bonaparte had put in the consular constitution an article to the effect that no servant of the State could be prosecuted even for personal fault committed in the service without an authorization of the Council of State. It was not immunity; it was only precaution for the avoidance of unjust and vexatious prosecutions against officials. This institution was known under the name of the *garantie des fonctionnaires*. Observe that this was no privilege in favour of public agents. Without doubt, no authorization is needed to prosecute a simple citizen; but how could one conceive of prosecuting a citizen for an act committed in his function, since he exercises no function at all?

Moreover, we must add two remarks: If there was question of faults, torts and damages committed not by a state servant, but by a municipal or provincial agent, no authorization was necessary for claiming justice from the ordinary courts.

Secondly, it is sixty years since the law to which I have referred has ceased to exist. The first decree of the government of M. Thiers after the fall of the second emperor abrogated the *garantie des fonctionnaires* and also all other dispositions of general or special laws having for their aim the hindrance of the prosecution of public officials of every kind (that is the exact translation into English of the decree passed September 19, 1870).

So, therefore, since 1870, nothing has hindered the prosecution of any official for personal fault before the ordinary courts.

But what has been said only applies to the prosecution of officials for personal faults, not for *fautes de service*. Between these two kinds of faults a fundamental difference is made in French legislation. This is clearly explained by Professor Morgan: "The *faute personnelle* is an act or default accompanied by 'malice' in the sense of an improper motive; and, where this feature is absent, the act or default, although wrongful, is regarded as a *faute de service* over which the administrative courts alone have jurisdiction."

We must add that, in practice, it is not always easy to discern if a deed of which one complains constitutes a *faute de service* or a *faute personnelle.* Should a difficulty arise on this point, it is brought before the *tribunal des conflits*, composed of an equal number of *Conseillers d'État* and of *Conseillers à la Cour de Cassation.* The only question to be decided is not if a compensation, or what compensation, is to be allowed, but who is responsible for it, the service or the servant?

In every case, if there is proof of an illegal damage having been committed, the citizen is certain to obtain compensation.

It must not be supposed that the citizen is less protected if the State should be his debtor and the Council of State his judge, than if the judge should be the ordinary tribunal and his debtor the guilty state servant. It is quite the contrary. The conception of the Council of State with regard to natural justice is much broader than that of our civil jurisdictions.

Our tribunals, following the strict letter of our private law, consider that responsibility is grounded on the idea of a fault. See art. 1382: *Tout fait de l'homme qui cause dommage à autrui oblige celui par la faute duquel il est arrivé à le réparer: i.e.* "Every act of a man causing damage to another obliges the man by whose fault the act is committed to repair it." If no fault is proved no compensation is to be allowed. Should my window be broken by a madman, I cannot sue the madman for compensation. The deed is considered an accident, just as if I had been the victim of a thunderbolt.

On the contrary, when the responsibility of the State is in question the Council of State takes the risk into account, and not the fault.

One finds frequently in the decisions of our Council of State this remarkable dictum: *Attendu que la responsabilité de l'État n'est ni générale ni absolue, qu'elle a ses règles propres qui varient suivant les besoins des services*, etc.: *i.e.* "Whereas the liability of the State is neither general nor absolute, that it has its particular rules, which vary according to the needs of the services," etc.

One might infer from these terms that the Council of State would be inclined to be more indulgent in appreciating the liability of the State than the tribunals in judging the responsibility of individuals.

It is sufficient to be acquainted with the jurisprudence to recognize that the supreme administrative court has pushed to the utmost limits the duty of compensating whosoever can prove that he has been injured, by any act whatsoever of an official of any kind and in any sort of public service.

In conclusion, I shall be glad if what I have said has shown to those who may still have doubts on the subject that administrative law exists; that it constitutes an important branch of juridical science, since good order in the State depends on it; that this science has been brought in France to the highest degree of perfection; and that we are not to be pitied on that account, but more justly to be envied. We must not forget that we owe these advantages and guarantees of justice to the great institution created by Napoleon, the *Conseil d'État*. Administrative law in France has become, in English terms, a real equity.

WHAT HAS BECOME OF ROMAN-DUTCH LAW?[1]

[*Contributed by* PROFESSOR R. W. LEE, D.C.L.]

A Vanished Friend.—We have most of us at one time or another had the experience of parting from a friend or relative, who has gone over-seas to seek his fortune in a foreign land. For a time we exchange letters and endeavour to maintain the old association. But, before long, correspondence flags and finally ceases. After many years, perhaps, the wanderer revisits his old home, and the former acquaintance is renewed. Then, if any spark remains of old affection, we are anxious to know how he has fared in the new land. Has he adapted himself to changed surroundings? What has he been doing since last we had news of him? Has he "made good"? We see him changed, and yet a gesture, a phrase, a way of looking at things, recall to us the friend of long ago. We find, perhaps, that the man's character has developed, but that fundamentally it remains what it was. *Cœlum non animum mutant qui trans mare currunt.*

Is it too fanciful to draw an analogy between the case of our far-travelled friend and that of a body of laws transplanted from its native land to distant dependencies over-seas? I am to consider the question "What has become of Roman-Dutch law?"—to invite you to renew acquaintance with the law of this country,[2] carried to its colonies three centuries ago, and for more than a century denied vitalizing contact with the source of its being. You will find it profoundly altered, but retaining its name and much of its substance. In South Africa to-day, and in less measure in Ceylon, much of the system of law which ceased to be authoritative in this country in the first decade of the last century remains in force, and the texts of Grotius, Van Leeuwen, John Voet, Van der Keessel and Van der Linden, with others of the old writers, are still consulted by practitioners of the living law. I say "system of law," but I think you will not dissent, if I add that the system was very unsystematic. To say nothing of the divergent opinions of Romanists and of anti-Romanists, which, if they have lost their former acerbity, even to-day are not entirely reconciled, one cannot fail to recall the kaleidoscopic variety of local customs, the despair of eighteenth-century reformers. The phrase "system of law" is indeed often merely a convenient description of the body of law at any time in force in a given country. What we call a system is in many respects a conglomeration. It is not so entirely one that great sections of it cannot be modified, or even replaced, without fatal results to the whole. Constitutional law depends on political allegiance, commercial law is peculiarly responsive to external influences, great changes in procedure may leave the substantive law unchanged. As compared with these, what we call specifically the civil law of a country is stubbornly unwilling to change. If this, the kernel of the legal system, retains its character substantially unaltered through successive ages, we shall say that the "system" continues to exist. It will be my task to examine how far there is a real continuity between the Roman-Dutch law of Holland and the present-day law of South Africa and Ceylon.

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[1] A paper read to the *Leidsche Vereeniging voor Wetenschappelijke Voordrachten*, October 1929.

[2] Holland.

The Law of the Dutch Colonies.—It was a maxim of the eighteenth and nineteenth centuries that when an Englishman betook himself to a country where no civilized system of law was already established he carried with him, as his birthright, the common law of England. Hence the predominance of the common law in the United States of America, in Canada (except Quebec), in Australia, and in New Zealand. In the same way the Dutch administrators and settlers carried to the colonies over-seas the laws of the home-country. These are variously described. I find them referred to "as the common civil laws as they are practised in the United Netherlands," or as "the laws, statutes and customs in use in the United Netherlands."[1] Such phrases leave much to desire in point of precision. In practice recourse was had, in the absence of any statute locally applicable, to the laws of the Province of Holland and West Friesland. In the matter of intestate succession it was further necessary to decide between the Aasdoms law of North Holland and the Schependoms law of South Holland. The choice between these two systems was not the same in all the Dutch colonial possessions. The story of their claims is extraordinarily confused.

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[1] *De gemeene civile regten soo als die in de Vereenigde Nederlanden werden gepractiseert.* Resolution of the Governor-General and Council of June 16, 1625. Cp. Van der Chijs, *Nederlandsch-Indisch Plakaat Boek*, vol. i, p. 126. *De rechten statuten ende costumen in de Vereenighde Nederlanden gebruyckt.* Van Diemen's Statutes of Batavia, *in fine*; Van der Chijs, vol. i, p. 593.

We see then the law of the Province of Holland, to which we are accustomed to give the name of "Roman-Dutch law," established as the common law of the Dutch possessions over-seas.[1] Of course, this statement must be at once qualified by the addition of the words "so far as applicable to local conditions." Much was necessarily left behind. This included all local customs, which, we must remember, formed a large part of the law in being in the mother-country. It included also the bulk of the statute law. In these circumstances the exported law lost sharpness of outline. It furnished a somewhat blurred background to a picture, the details of which were supplied by the legislative authorities competent in the colony in question. The administration of the criminal law left much to the discretion of the judges. In civil matters, when a judge or advocate had occasion to go behind the local ordinances to inform himself as to the fundamental principles of the law, he would have recourse for the most part to the well-known text-books, the *Inleiding* of Grotius, Van Leeuwen's *Roomsch-Hollandsch Recht*, Voet's *Commentary on the Pandects*. At a later date we find in the constitutions of the South African Republic and of the Orange Free State a special authority accorded to these and other writers. We may, I think, infer that this reproduced a traditional practice in use in the courts of the Cape Colony in the eighteenth century.

Law under the British Regime.—When the Colony of the Cape of Good Hope passed finally to the British Crown in 1806 the existing laws were in principle retained. This was in accordance with constitutional practice, and may perhaps have been contemplated in the terms of surrender. But no one will suggest that even an express provision to this effect could paralyse the hands of the legislator for all time to come. In fact, the mass of the pre-British legislation of the colonies, together with such of the Statutes of India[2] as had local authority, was soon superseded or forgotten. This is scarcely surprising. Many of these enactments were of a temporary character, or implied an administrative machinery which was abrogated or modified. Some pre-British statutes, I have sometimes thought, may have lost their identity in the body of South African customary law, but this is a line of inquiry which I leave to others.

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[1] In the colonies under the control of the West India Company the law of Zeeland may have been preferred, but this differed little from the law of Holland.

[2] The Statutes of India (also known as the Statutes of Batavia) were the Ordinances of the Governor-General in Council, whose seat was at Batavia in Java. They were twice collected, by Van Diemen in 1642, and by Van der Parra in 1766.

The neglect or repeal of the statute law of the Colony, of no great importance in itself, is a symptom of changes of far-reaching consequence. All that we vaguely describe as constitutional law, that is, the law or custom which determines the seat of sovereignty, the machinery of government, the relation of the subject to the central and local authority, assumed and has retained a British complexion. Procedure, civil and criminal, adapted itself to the English pattern, though not to the exclusion of institutions derived from the Dutch law. The English law of evidence was introduced. The criminal law became a mixed system to which both the Dutch and the English law have contributed their share. In the field of commercial law, as was natural, English influences have been predominant. Within the area of the civil law these influences have been felt, but not in the same degree.

Method of Treatment.—Such, in a few words, are the conclusions to which we shall be led by an investigation of the existing law of South Africa. I have hesitated between the historical and what may be termed the logical method of treatment. This last would consist in examining each department, and within each department each institution, of the old law, and seeing how far it is in force at the present day. But this would be not to give a lecture, but to compose a treatise. Besides, the course of events, which dictates the conditions of my task, has no regard to the scientific categories of the class-room. I believe that my object will be best attained by drawing your attention to the principal legislative enactments of the last hundred years in the order of their occurrence so far as they are relevant to our inquiry. This will show you how the Roman-Dutch law has been treated by the Legislature. In a subsequent part of my address I shall discuss its treatment by the Courts of Justice. These two lines of inquiry will, I hope, enable me to present to your minds a picture of the existing state of the law, and to answer the question " What has become of Roman-Dutch law ? " If my method is rather haphazard and incoherent, so also are the facts with which it deals.

British Influences at the Cape.—The early years of British rule in the Colony of the Cape of Good Hope were a period of transition. In 1827 a Charter of Justice (soon replaced by the New Charter of 1834) introduced a judicial system modelled upon the system obtaining in England, and at the same time the Law of Evidence was brought into harmony with English law. The age of majority was reduced from 25 to 21. The Orphan Chamber was abolished, and its functions were transferred to the Master of the Supreme Court. Three important Ordinances of 1834 contain (1) consequential provisions to effect this transfer; (2) rules for the registration of wills and the administration of the estates of deceased persons; and (3) rules for the administration and management of the estate and property of minors, lunatics, and persons absent from the Colony and for the proper care of the persons of minors and lunatics. Of these the second, in particular, had far-reaching consequences, for it substituted a system of administration similar to that in force in England for the universal succession of the old law, the function of the heir being transferred to an executor, testamentary or dative. In 1839 the Marriage Order in Council, issued by the authority of the King in Council, regulated the celebration of marriage, and put an end to the action to compel marriage, which had been an unpleasing feature of the old law. In 1843 the Ordinance for regulating the due collection and distribution of insolvent estates within the Colony introduced a code of insolvency law, neither entirely Dutch nor entirely English in character, which was imitated in the Republics and has developed into the present insolvency law of the Union, contained in Acts 32 of 1916 and 29 of 1926. In 1845 a Wills Ordinance authorized a will signed by the testator in the presence of two or more competent witnesses, as required by the law of England, but left untouched the notarial will, codicils made under the reservatory clause, and wills which if executed before the date of the Act would not have required any witnesses at all. This preserves the military will and the *testamentum parentis inter liberos*. After this, there is no change of fundamental significance until the years 1873 and 1874, which saw the abolition of the Falcidian and Trebellian portions and of the *legitim*. It is impossible not to see in this departure from the principles of the old law the influence of English ideas. From this time forward testamentary disposition is absolutely free, and a parent may disinherit his child without leaving him so much as the proverbial shilling.

The General Law Amendment Act.—But the high-water mark of English influence is indicated a few years later in the General Law Amendment Act of 1879. This Act, passed to give effect to the recommendations of a Commission, which had been appointed to investigate the existing state of the law, enacts as follows:

> S. 1. In all questions relating to maritime and shipping law in respect of which the Supreme Court has concurrent jurisdiction with the Vice-Admiralty Court, the law of this Colony shall hereafter be the same as the law of England, so far as the law of England shall not be repugnant to, or inconsistent with, any Ordinance, Act of Parliament, or other statute having the force of law in this Colony.

The significance, and at the same time the policy of this provision, depends upon the fact that the Supreme Court of the Colony exercised a two-fold jurisdiction, first its ordinary jurisdiction as such, secondly a jurisdiction conferred upon it by Imperial Statute as a Colonial Court of Vice-Admiralty. It administered in its latter capacity English Admiralty law, in its former capacity the Roman-Dutch law as the common law of the Colony. In so far, therefore, as these differed, the same court might find itself on different occasions applying different rules of law to precisely similar states of fact. It lay with a plaintiff to decide which system suited him best, and to resort accordingly to one or other jurisdiction. This anomaly was put an end to at the Cape by the above-cited section. It continues in the Province of Natal, where the Cape Act is not in force. S. 2 enacts that the English law shall be applied in questions of fire, life, and marine insurance, stoppage *in transitu* and bills of lading. By s. 3 Acts of the Imperial Parliament passed after the taking effect of the Cape Act are not to be of force in the Colony unless re-enacted there.

It appears from the Report of the Commission that the provisions of s. 2 of the Act were not intended to effect a revolution, but merely to give legislative sanction to an existing practice. The Commissioners had included in their recommendation the decision of cases relating to negotiable instruments. This was not adopted, but later the Cape Parliament enacted a Bills of Exchange Act, No. 19 of 1893, which closely follows the British statute. There is almost identical legislation in the other Colonies, now Provinces of the Union of South Africa. Other sections of the General Law Amendment Act abolish certain rules of the old law by providing as follows :

> S. 7. In the absence of any special stipulations to the contrary contained in any contract of lease, no lease of land shall become void or voidable, nor shall the rent accruing under such lease be incapable of being recovered on the ground that the property leased has through inundation, tempest, or such unavoidable misfortune, produced nothing, or on the ground that the lessor himself has absolute need of the land or other property leased.

S. 8. No contract shall be void or voidable by reason merely of *læsio enormis*, sustained by either of the parties to such contract.

Later Legislation.—After this important Act, I do not find any Acts in the Cape Statute Book which need detain us. I have mentioned the Bills of Exchange Act of 1893. Nor do I intend to trace the course of legislation in the other Provinces of the Union. Enough to say that Cape statutes served as a model even for the independent Republics, and that after annexation many changes were made in the laws of the Transvaal and of the Free State bringing them into harmony with the law of the Cape. Natal, which was separated from the Cape in 1856, has been apt to pursue a path of its own, not always with the best results. Since the union of the four Provinces there have been important consolidating Acts, and one or two Acts (not more) which have changed the common law. Under the first head I instance the Administration of Estates Act, 1913, the Insolvency Act and the Patents, Designs, Trade Marks, and Copyright Act, 1916, the Criminal Procedure and Evidence Act and the Magistrates' Courts Act, 1917, the Deeds Registries Act, 1918, the Companies Act, 1926. Acts which change the common law are the Removal or Modification of Restrictions on Immoveable Property Act, 1916, and the Adoption of Children Act, 1923. The first has no very extended range. The second breaks away from the common law, so that we can no longer say, with Grotius, that "the adoption of children is unknown to our law." [1]

Judge-made Law.—So far the statute law. I pass to the decisions of the courts, a second source of law no less important—I may say, much more important—than the first; for if statute law makes more noise in the world, it is the courts that deliver the goods. At the very threshold of this topic I insist upon the fact that I am speaking of what is not inaptly known as "judge-made law"—another English influence, and of far-reaching importance. The principle that judges interpret, and by interpreting, make law, and the authority of the *res decisa* are as fundamental in the law of South Africa as they are in the law of England. Hence the great part the courts have played, and are playing to-day, in the development of the law. This is another channel through which the English law has permeated the law of South Africa, notably in the field of contract and of tort. And I beg you to observe that this is not the work of judges ignorant and careless of the system of law which it was their duty to administer, but has been a wholesome and natural process keeping pace with the expansion of social and commercial life. In his Preface to the second edition of his translation of Van Leeuwen's *Commentaries* Sir John Kotzé, who himself held high judicial office for nearly fifty years, pays a tribute to the eminent men—Menzies, Cloete, Christopher Brand, Bell and E. B. Watermeyer, to whom he says "it is mainly due that the Roman-Dutch law has established itself so securely in its southern home, and prevails as the common law of our country." Of these five (all, except Brand, judges of the Cape Supreme Court), Menzies and Bell were Scottish lawyers, trained therefore in a system not remote from the Roman-Dutch law; the other three were South Africans, and Cloete and Brand had been educated at Leiden. These names belong to the forties and fifties of the last century. At a later period, Chief Justice de Villiers, greater perhaps as a judge than as a lawyer, presided over the Supreme Court of the Cape from 1873 to 1910, and then over the Appellate Division of the Supreme Court of South Africa until his death in 1914. In the Transvaal Sir James Rose-Innes presided over a strong court, which bridged the interval between annexation and union. He succeeded Lord de Villiers as Chief Justice of the Supreme Court of South Africa, and was himself succeeded by Sir William Solomon.[1] Enough has been said to indicate a rich mine of investigation in the reported decisions of the South African courts. Since the date of Union, particular interest attaches to the decisions of the Appellate Division of the Supreme Court of South Africa, which is playing a part of vital importance in forming the modern law. To anyone who would inform himself as to the existing state of the law I can suggest no better course than to study the jurisprudence of this tribunal.

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[1] Gr. i, 6. 1.

Decisions of the Appellate Division.—In the few remarks upon the "judge-made law" of South Africa, which are all that time allows me, I shall refer to some recent decisions, principally of the Appellate Division, but my aim will be rather to convey a general impression than to enter into detail. I distinguish (*a*) cases in which the court affirms the old law; (*b*) cases in which it declares the old law obsolete; (*c*) cases in which the English law is admitted *in subsidium*; (*d*) cases in which the two systems are reconciled and adjusted.

(*a*) *Cases in which the court affirms the old law.*—These occur, I think, principally in the field of the law of Persons, of Property, of Succession, and in some parts of the law of Obligations. The proprietary relations of husband and wife as defined by law remain in effect what they were in the time of Grotius. The law of *fideicommissa* is obstinately conservative. Mutual wills are known and in frequent use. The law of intestate succession depends upon the Political Ordinance of 1580 and the Octrooi to the East India Company of 1661; that is to say, it is mainly Schependoms law, but incorporates art. 3 of the Placaat of 1599, which is New Aasdoms law. Very recently the Natal court had to go back to these sources in deciding whether a sole surviving grandparent, a deceased mother's mother, was entitled to succeed *ab intestato* along with relatives *ex parte paterna*.[1] In the law of Obligations the most important decision pronounced since the Union is the case of *Conradie* v. *Rossouw*,[2] which gave the quietus to de Villiers' ill-advised attempt to impress the doctrine of consideration upon the law of South Africa.

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[1] Sir William Solomon has in turn been succeeded by the present Chief Justice, the Hon. J. de Villiers.

(*b*) *Cases in which the old law has been declared obsolete.*—Under this head mention may be made of the much-litigated case of *Fitzgerald* v. *Green*,[3] in which the Appellate Division, adopting Kotzé J.'s decision in the Eastern Districts Local Division, held that an adulterine bastard may take under the mother's will. In *Heinamann* v. *Heinamann*[4] the same court decided that inasmuch as adultery has ceased to be a crime in South Africa, all incidental pains and penalties have fallen away, including the prohibition of inter-marriage between persons who have committed adultery together and the inability of such persons to inherit from each other.

In another branch of the law the court has held in the more recent case of *O'Callaghan* v. *Chaplin*,[5] confirming the rule laid down many years ago at the Cape, that noxal surrender forms no part of the law of South Africa.

(*c*) *Cases in which the English law is admitted* in subsidium.—Instances of this class are very numerous, as appears from the frequent appeal to English cases in argument and in the judgments of the court. In a recent case Solomon C.J. said, " There being then no case in our courts exactly in point I turn to English decisions to see whether any assistance can be obtained from them."[6] This indicates very clearly the nature of the help which the courts derive from English case law.

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[1] *Caney* v. *Est. Johnsson* [1928] N.P.D. 13.

[2] [1919] A.D. 279.

[3] [1911] E.D.L. 433; *Green* v. *Fitzgerald* [1914] A.D. 88.

[4] [1919] A.D. 99.

[5] [1927] A.D. 310.

[6] *Mancho* v. *South African Railways and Harbours* [1928] A.D. at p. 100.

(*d*) *Cases in which the two systems are reconciled and adjusted.*—Perhaps this is not quite the right formula; "contaminated" might be better, if the word is understood in its classical sense. What I wish to convey is that there are sections of the law in which the two systems are so intermingled that it is difficult to extricate the tangled skein. Thus, as regards the conditions of responsibility for negligent damage to person or property, a very fertile source of litigation at the present day, the foundations of the law are to be looked for (*pace* the memory of the great Fockema Andreæ) in the *Lex Aquilia*, but upon this basis has been raised the incoherent English theory of contributory negligence. So the action for defamation is fundamentally the *actio injuriarum*, but marvellously overlaid by accessions derived from English law.

Some Words of Dispraise.—Much has been said in praise of Roman-Dutch law. I subscribe to it. Shall I be a traitor to the cause if I say some things in its dispraise? It is loaded with much archaic matter, which has no reason to exist except that it is there. It is cast in an ancient mould. It is to be looked for in an undigested mass of law-books written in Latin and in the Dutch of by-gone centuries. It has broken from its moorings in Europe. Codification and scientific doctrine have left it untouched. It has learnt from English law to despise professors and to live from hand to mouth. It has borrowed from the same source much that has helped it to adapt itself to a new age, much too that harmonizes imperfectly with what was there before. All of which is respectfully submitted for your consideration.

Is Roman-Dutch Law Alive or Dead?—At the beginning of my address I set out to answer the question "What has become of Roman-Dutch law?" It is strange that I should be led to ask myself and you another question: "Is Roman-Dutch law alive or dead?" Not very long ago, Sir John Kotzé, then a judge of the Appellate Division, dealing with a question of criminal law, said, "The point has, of course, to be decided by our law and not by the rules of Roman-Dutch jurisprudence, which are only applied as subsidiary common law, where our own law and practice are silent on the subject."[1] So the law of South Africa of to-day, according to this great authority, is not the Roman-Dutch law, but a new system, built upon an old foundation. It is a construction native to the soil. The law of Rome, the law of Holland, the law of England, have gone to make it what it is.

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[1] *Rex* v. *Mlooi* [1925] A.D. at p. 149.

Roman-Dutch Law in Ceylon and British Guiana.—I have confined my remarks to South Africa, but, as you know, the Roman-Dutch law established itself in two other parts of the world, now British possessions, namely Ceylon and British Guiana. The story of its fortunes in these two Colonies I must dismiss in a few words. In Ceylon it still exists as the common law of the island. But the processes which we have observed at work in South Africa have there gone much further. The English maritime and mercantile law has long been the law of the island. More recently the English Sale of Goods Act has been taken over. Community of goods ceased to be a consequence of marriage so long ago as 1876, and there is now a Married Women's Property Ordinance, which reproduces the language of the English statutes. As to British Guiana, the Roman-Dutch law, after languishing for a century, was from January 1, 1917, replaced as the common law of the country by the common law of England.[1] In both these countries, as happens where a legal system lacks vitality, one notes here and there a strange persistence of archaisms, from which the more vigorous law of South Africa has known how to free itself.

The Future of Roman-Dutch Law.—What will be the future of Roman-Dutch law (if I may still so call it) in South Africa? It might be codified and thus assume a changed, but more stable and permanent form. But, so far as I can learn, there is no feeling for codification, and in the extremely fluid condition of the existing law it is not to be recommended. It is more probable that the history of Scottish law will repeat itself, and that the Roman and Roman-Dutch law will recede further and further into the distance, as the legal scene is more and more occupied by statute and judge-made law.

But the probability, or certainty, that this will be the future of the Roman-Dutch law does not in the least affect its place in the education of the students who are to practise law in the countries upon which this system has left an indelible impression.

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[1] *The Civil Law of British Guiana Ordinance*, 1916.

LIABILITY IN DAMAGES UNDER FRENCH ADMINISTRATIVE LAW.

A STUDY OF THE RIGHT OF ACTION FOR DAMAGES UNDER FRENCH ADMINISTRATIVE LAW FOR INJURIES CAUSED TO PRIVATE PERSONS.

[*Contributed by* PROFESSOR LOUIS TROTABAS, *Nancy*.[1]]

The General Rules of Liability in Damages in French Administrative Law and their Legal Grounds.—No part of the French law has been more profoundly modified in the course of the last thirty years than administrative law. The transformation between the end of the nineteenth century and the present time has been so complete that, except as regards the technical rules of administration, very few of the principles accepted at the earlier date are good law to-day. This movement of intense evolution has manifested itself, on the one hand, by the affirmation more and more clearly formulated of the privileges indispensable to government departments in order to ensure the satisfactory working of the public service, and, on the other hand, by the claim that the members of the public have the right to insist that the administration should be conducted in accordance with law and equity. The reconciliation of this privileged position on the one side with the claims of law and equity on the other has been the work of our *Conseil d'Etat*, and has been performed in a manner worthy of all praise. The *Conseil d'Etat*, with unwearied zeal, has played the part of mediator between the government departments and the individual citizen.

It is very important to draw attention to this rôle of the *Conseil d'Etat*, because it reveals the essentially judicial or prætorian character of our administrative law.

Apart from the technical rules of organization, our administrative law is characterized essentially by its *unwritten* nature. We do not find in the French law, as a pendant to the complete codification of the civil law, the commercial law and the penal law, any similar codification of administrative law. It is no doubt possible to group together and to present in one volume the legislation on this subject, but this does not constitute a code of administrative law, because there is no such formulation of general principles as characterizes a code. This means that the great reforms which have transformed our public law since 1872 have been brought about, apart from statute and without any legislative intervention by the constructive activity of the *Conseil*

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[1] Translated by the Editor.

d'Etat in its judicial decisions. This activity has been turned in two different directions. On the one hand, the *Conseil d'Etat*, as, so to speak, the conscience of the administration, has accustomed itself to become ever more effectively the judge of all kinds of administrative activity. That is to say, from the objective point of view of pure legality and of pure equity, it has habituated itself to examine the correctness of the juridical acts of administrative authorities. It has assumed the power to annul any of these acts which are shown to be incompetent, bad in point of form, in violation of the law, or an exercise of the authority in an improper manner (*détournement de pouvoir*). This is the theory of the remedy against an act which exceeds the powers of the authority (*recours pour excès de pouvoir*), and this theory has been now so fully elaborated that one may say without exaggeration that every individual citizen has the right of calling upon the *Conseil d'Etat* to examine the legality and the equity (*moralité*) of every administrative decision.[1]

But the exercise of jurisdiction in this direction was not enough. It enabled the *Conseil d'Etat* to exercise a control only over administrative decisions *in abstracto*. The remedy *pour excès de pouvoir* no doubt enables the citizen to claim objectively that law and equity shall be respected by administrative authorities, but it gives him no power to vindicate subjectively his patrimonial rights in conflict with the State. Such a power is, however, necessary, because the privileges of the State allow the administrative authority to pass from the decision (which is subject to control by the suit for *excès de pouvoir*) to the execution of the decision, and this, also, requires to be controlled. The execution of the will of the administration manifests itself in a concrete manner in every form of administrative activity, and it is to the control of this activity that the *Conseil d'Etat* has had to apply itself in the second place. From this point of view it is no longer a pure question of objective law or equity, it is a question of estimating subjectively and in terms of money the consequences of administrative activity as regards the individual citizen. For it is possible that any one of the numerous public departments in the discharge of its functions for the service of the community may cause damage to a determinate individual, and it is not just that this individual should, in the last resort, suffer this pecuniary loss. Accordingly, in order to secure the control and the sanction of administrative activities which conflict with the pecuniary interests of individual citizens, we find that there has been developed in connexion with the *Conseil d'Etat* an official department known as the *Contentieux de pleine juridiction* parallel with the official department known as the *Contentieux de l'annulation*, which takes charge of the suits for annulling a decision on the ground of *excès de pouvoir*. The *Contentieux de pleine juridiction* is concerned with administrative acts not liable to be annulled *pour*

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[1] For more details as to the *recours pour excès de pouvoir* see the very interesting work of M. Raphael Alibert, Le *Contrôle Juridictionnel de l'Administration au moyen du recours pour excès de pouvoir*, Paris (Payot) 1926.

excès de pouvoir, and it is by the agency of this department that a citizen who has suffered pecuniary loss through the activity of an administration may obtain reparation.

This statement of the principle of administrative liability for damages makes it clear in what sense we must understand that term. It is not a question of the liability to which an administration may be subject on account of the violation of certain rules of penal law. It is a question simply of what is called civil liability. Unfortunately this expression lends itself to confusion, because administrative law, by definition, is outside the sphere of civil law. Nevertheless, the term "civil liability" correctly conveys the idea of pecuniary compensation which we desire here to study. Upon this matter, in fact, the work of the *Conseil d'Etat* since the beginning of the century had been at least as fruitful as its work in the field of the remedy *pour excès de pouvoir*.

The remarkable evolution in the judicial decisions is clearly manifested when we consider that in 1896 Laferrière, the pioneer of our modern administrative law, was still able to write in his notable *Traité de la Juridiction Administrative* that "the characteristic of sovereignty is that it imposes itself on all persons without any right of compensation." To-day, on the other hand, as we shall see later, there is hardly any matter in which the public authority can exercise its competence without running the risk of making itself liable in damages. And, moreover, in this evolution of judge-made law in a direction so much in favour of the protection of private property there is a profound significance. It is remarkable that, at the beginning of the nineteenth century, when popular ideas were all in favour of individual liberty, when, under the regime of the French Revolution—profoundly individualistic as it was and bound up above everything with the defence of the rights of the individual—individualism was often carried to excess, as we can see from many illustrations in our codes, to find that, at that very time, there was no protection of the pecuniary rights of the individual in conflict with the State. It was not until individualism had been called in question and new conceptions of public law had emerged that a better protection of the rights of the individual against the State was secured, though such a consequence was not one which at first sight would have been expected. The truth is that by the nature of things the idea of right involves of necessity the idea of duty, and that to every power of action there must be attached a corresponding sanction. Irresponsibility in any domain is not a strength but a weakness, as might be proved if necessary by illustrations from constitutional law. And it is an entirely natural consequence of the development of the idea of administrative power that the responsibility of the State should have steadily grown greater and become, so to speak, inevitable. But, true as this is, there were plenty of obstacles in the way of determining the extent of this responsibility. On every side difficulties presented themselves to hamper the *Conseil d'Etat* in the construction of that general theory of administrative responsibility which it has at last given to us. The first difficulty was to fix the basis of this responsibility. As we have seen, there was no legislation on the subject, and the *Conseil d'Etat* took advantage of this to construct a theory of its own (without excluding the possibility of other theories) under which two solutions are possible. In some cases, the State is held responsible on the ground of fault, in accordance with the principles of common law. In other cases, on the contrary, the responsibility is based upon the idea of risk, *i.e.* of liability without fault, when the circumstances lead to this conclusion.

Then, again, there is the difficulty of deciding who is the person responsible, a difficulty which arises from the fact that between the individual who has suffered damage and the administration which has caused it there is interposed the complex personality of an official. Is it the official in his personal capacity who ought to make good the loss which he has caused, or is it, on the contrary, the administration which ought to cover its agent? Upon this point also there is no text to go by, and the *Conseil d'Etat* admits both solutions according to circumstances. In certain classes of cases it declares that the agent is liable personally, while in other classes of cases it makes the administration liable.

Finally, there is the difficulty of determining what jurisdiction is competent, seeing that in France we have two separate hierarchies of courts, the courts of common law[1] which are subject to the control of the *Cour de Cassation*—and the administrative courts, at the head of which is the *Conseil d'Etat*. It is the business of the courts of common law to protect the person and the property of the individual, and from this point of view it might seem that it is within their competence to judge of the reparation of damage caused to private property. But, seeing that this damage is here caused by administrative activity and that it is the business of the administrative courts to judge of administrative activities, it seems clear from this point of view that the administrative courts are competent. Upon this matter also our administrative law admits the co-existence of the two solutions. In certain cases the courts of common law are competent, whereas in other cases the administrative courts are competent.

To sum up, the general theory of liability for damages which has been elaborated since the beginning of the century by the *Conseil d'Etat* is the result of the continual combination of the different solutions possible. The conclusion reached is that either of two persons, namely the official and the administration, may be liable according to circumstances, and accordingly the *Conseil d'Etat* has been obliged to lay down the rules by which we are to fix the liability, sometimes upon the one, and sometimes upon the other of these persons. In the second place, the theory admits two distinct grounds of liability, namely, fault and risk (*i.e.* liability without fault) and the court has had to formulate rules by which it will be guided to accept in some circumstances the subjective solution of fault, and in other circumstances the objective solution of risk.

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[1] In this article I have used the term "courts of common law" to denote the ordinary courts as distinguished from the administrative courts. (Note by Translator.)

And, finally, the theory admits that either of two courts, namely, the court of common law and the administrative court, may be competent according to circumstances, and it gives rules for deciding in the particular case whether we are to adopt the point of view of the victim and hold that the court of common law is competent, or whether we are to prefer the point of view of the State and hold that the administrative court is competent.

The explanation of the general theory of administrative liability is accordingly a study in three dimensions. But, in order to get a general view, it is sufficient to deal with the question as to the determination of the person liable. For, in explaining the rules which settle against what person the action should be directed for damage caused by an administrative act, we can at the same time examine the basis of this liability and the question of jurisdiction.

I shall therefore examine in this and the two succeeding articles the subject of administrative liability for damages, distinguishing between the cases where the official is liable personally and those where the administration is liable, and this bipartite division will lead to the consideration of a third point, namely, the possibility of the official and the administration being *both* liable in respect of the same act.[1]

The Personal Liability of Officials.—At first sight it may appear strange to approach the study of actions for damages against the State by an examination of the personal liability of officials. Nevertheless, when we reflect on the problem as a whole and take into consideration the fact that the official is an agent charged with the duty of performing in the name of the administration the acts which the public service requires, it becomes clear that we cannot possibly study the liabilities which may be created by these acts without dividing them into the two classes, namely those in which the agent is liable and those in which the administration is liable on his behalf.

On historical grounds and on grounds of good sense alike, the study of the personal liability of officials falls within the general framework of administrative liability. The individual citizen who has suffered an injury caused by administrative activity is impelled naturally to impute the liability to the person who has actually caused the injury. It is only after a process of analysis which presupposes a considerable evolution of the principles governing the subject that the person of the official may disappear from the scene and the administration be left in his place as the person liable. Above everything let us not forget that the principle of the non-liability of the State was for a long period accepted as a dogma, so much so that the personal liability of the agent (in the cases in which it was held to exist) might be considered as the *minimum* granted to the victim and as the first victory gained by the individual citizen in the struggle to obtain reparation for certain damages caused by administrative acts. It is, in fact, in the development of the rules as to this personal liability of the agent that we see the first beginnings in public law of actions for damages based on injuries caused by administrative acts. This aspect of the case indicates the most suitable manner in which we may study the personal liability of officials. This liability, in fact, may be of two different kinds. As the intermediary between the administration in whose name he acts and the members of the public whose interests may be affected by his official activity, the official may find that he has made himself liable both to the administration and to the public. We are here concerned only with this second liability, but, seeing that we shall not refer again to the liability of the official to the administration, it is worth while stating briefly how this matter has been decided in French public law. As a matter of fact, our public law has disposed of this problem in a very original manner by drawing a distinction between financial officials and officials of all other departments. As regards the first, it is held that they are liable *vis-à-vis* of the State, whereas as regards the non-financial officials, it is held that no such liability exists. Speaking more precisely, the rules of French public law distinguish in financial administration between two classes of agents, the " higher officials " (*ordonnateurs*) and the " accountants " (*comptables*). The accountants are those officials of the financial administration who have to handle public money. In virtue of a mass of complicated regulations of a very strict kind, these officials incur a heavy responsibility towards the State in respect of taking care of public money which is in their hands and of depositing it in a regular manner, and in the case of those *comptables* who have the duty of employing public money, there is a similar responsibility as regards spending the money in the proper manner. With regard to the " higher officials " or *ordonnateurs*, they are the superior agents whose function it is to take decisions which involve the spending of public money. The chief of these higher officials is the Minister. As regards these administrative agents of a superior order, it is extremely difficult to organize any effective responsibility on their part to the State, apart, of course, from their political responsibility. Nevertheless, our public law does, in fact, recognize this liability, at least as a matter of principle, and the law of August 10, 1922, provides expressly that ministers and other higher officials shall be civilly liable in respect of agreements or of orders on the Treasury which constitute an improper application of public money. But this responsibility, which presupposes the intervention of a court of justice, is found in practice to be too delicate to be capable of enforcement in this way.

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[1] The bibliography is too extensive to be given here fully. It will be sufficient to cite the fundamental work of M. Georges Teissier, *La Responsabilité de la Puissance Publique* (1906), unfortunately out of date on some points on account of recent decisions, and the very suggestive study of M. Paul Duez, *La Responsabilité de la Puissance Publique* (*en dehors du contrat*), (Paris, Dalloz, 1927), which gives the latest developments of the theory.

In opposition to the *comptables* who may incur personal liability to the State must be placed all other government officials. They are in principle not liable to the State. Without discussing this principle or studying its applications and the exceptions to the rule, it may be sufficient to cite by way of illustration a decision of the *Conseil d'Etat* which is a particularly instructive application of the rule. This is the case of *Poursines*. In the course of the war an officer, after an incorrect procedure, caused a man to be shot as a spy. It was subsequently proved that this summary execution had been irregular and the heirs of the victim obtained compensation from the State. But when the State wanted to turn round on the offending officer and recover the damages from him the *Conseil d'Etat* held that in the absence of any special legislation on the subject it was not possible to make this officer liable to make good "the loss which he may have caused to the State by an act of his which rendered the State liable in damages."[1]

Passing now from the liability of the official to the administration, we shall return to the real problem with which we are concerned, viz. the personal liability of the official to the public. This problem, in its main lines, omitting cases as to which there are special provisions,[2] is solved by the two formulæ which follow: (*a*) the official is not personally liable unless he has committed a fault, and (*b*) this liability falls within the competence of the courts of common law.

In order to reach these formulæ our administrative law, it is to be remarked, has had to reconcile conflicting interests. It has had in the first place to settle the problem of the personal liability of an official. In one view of the matter an official might have been considered as merely the agent of the administration, which was bound as a principal by his acts. But this leads to a conflict. On the one hand, we have the rule of the common law, by which an agent is relieved of all civil liability, leaving this to be borne by his principal, and, on the other hand, we have the primitive rule of the public law, which declares that the State, which in this case is the principal, must be free from liability. This conflict was settled by the recognition of a certain personal liability of the official, and this was the first step towards satisfying the claims of persons injured by administrative acts. But a new difficulty then presents itself. If it is expedient from the point of view of the individual citizen to admit a certain liability on the part of government officials, will not the effect of this liability be dangerous to the good administration of the public service? And, in fact, we must admit that on the question of making officials personally liable there is a good deal to be said on both sides. An official who has no liability to fear will be disposed to care less whether his acts cause damage, while, on the other hand, an official who knows he may be personally liable will be over-cautious for fear of this consequence. And if members of the public are entitled to drag any official before the courts is there not a risk of provoking or, at any rate, of making possible a kind of legal insurrection on the part of the public against the government services? May there not be such an abuse of the multiplicity of legal remedies as to interfere with the regular and steady course of the administration of government departments? These are the difficulties which French administrative law has got over by constructing the theory of the personal liability of officials, a theory based partly upon the so-called "administrative guarantee" and partly upon the doctrine of a "personal act" (*fait personnel*). We shall now take up these two points in succession.

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[1] *Conseil d'État*, 28 mars, 1924, Poursines, Dalloz, 1924, 3. 49, and the Note by Mr. J. Appleton. See on the question, Joseph Delpech, *De la Responsabilité envers l'État des fonctionnaires autres que les comptables*, in Mélanges Hauriou (Paris, Sirey, 1929).

[2] One of the most important of these special cases is the liability of *instituteurs* under art. 1384 of the Civil Code.

The Administrative Guarantee.—It is obvious that an official in the mere exercise of his functions may cause damage to individuals, and that this may occur when there has been no fault at all on his part. No one would enter the public service if he ran the risk of incurring personal liability for injuries, however slight, which he might cause, whether intentionally or not. It is necessary, therefore, that the official should be protected up to a certain point, that is to say that there should be the possibility of his causing injury in certain cases without incurring liability. The existence of the public services constitutes a risk to the public for whose benefit these services are carried on. We must accept this inevitable risk as attached of necessity to the working of the administrative machine. But how are we to determine with precision what are the injuries which the individual must put up with without any claim for reparation? How are we to draw the line between the zones of non-liability and of liability respectively? We must not forget that there is no legislation on the subject. Is it permissible for the courts in the absence of any enactment to fix without being arbitrary the point at which natural justice requires that the personal liability of an official should begin? Two answers to this question have been given at different times by French public law. In the earlier period it was left to the unfettered discretion of the government to fix the limits of these two zones, whereas, according to the theory which prevails at the present time, it is a matter for the courts to decide. From the intermediary period onwards special laws laid down precise rules in regard to what is called the administrative guarantee forbidding private citizens from suing at their discretion an official in respect of acts done in his official character. The laws of 1789 and 1790 allow private persons to sue an official only after obtaining the authorization of the head of the administration. It is this principle which was reaffirmed in the familiar art. 75 of the Constitution of the Year VIII in these terms:

"Government agents other than Ministers cannot be sued in respect of acts done in the discharge of their official duties except with the authority of the *Conseil d'Etat*." We must bear in mind that at that period the French *Conseil d'Etat* was by no means the independent court that it has been since 1872, and we note, accordingly, that the practical effect of requiring this authorization was to make the government the judge of the expediency of such suits and therefore the judge of the question whether the agent was to be responsible or not. As a matter of principle, it was left to the heads of the administration to filter the actions raised against officials and to decide in what cases the victim of the injury must bear it without reparation. They did not permit the liability of the official to be discussed unless in the circumstances this appeared to be necessary. But in every organization there is a tendency on the part of the superior to shelter his subordinates, and this rule applies to the government services. More particularly under strong governments in periods when discipline and authority are most vigorously exercised, and when, for that very reason, there is the greatest risk of injury being done to private rights, the central administration in its desire to maintain its authority has offered the most firm resistance to actions by individuals against government officials. During the period when art. 75 of the Constitution of the Year VIII was in force, and particularly under the Empire, few actions of this kind were authorized. Sometimes, even when the action was not one for damages but was a real action (*revendication*), the government protected its agent and would not authorize the action against him.[1]

It was the abuse of this protection which provoked the reform. Public opinion was dissatisfied with the non-liability which was practically ensured to officials and demanded the reform of the system laid down in the Constitution. In 1870 one of the first acts of the new government was to establish by a decree expressed in very wide terms the principle that the individual citizen should be entitled without restriction to sue a public official. The decree of September 19, 1870, is in these terms: "Art. 75 of the Constitution of the Year VIII is repealed together with all laws general or special having for their object to interfere with (*entraver*) suits brought against public officials of all ranks." This amounts to the complete abandonment of the administrative guarantee. It is, however, proper to notice that the State still preserves a certain power of control and supervision over suits by private persons against its agents. Art. 2 of the decree lays down the principle of pecuniary penalties "which it may be desirable to edict in the public interest against any person who brings a frivolous or vexatious suit against an official." Instead of protecting the official by preventing actions against him, which was the method of the Constitution of the Year VIII, we find in the decree of 1870 provision for affording him protection in another way by applying sanctions against persons who abuse the right accorded to them of suing an official for damages.

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[1] See *e.g.* the *saisie* of the *Histoire de la Maison de Condé* by the Duc d'Aumale in the hands of the publisher Michel Levy.

This decree of 1870 is still in force, but the conditions under which it is applied by the French public law differ considerably from the literal terms of the decree. Taking it literally, one would suppose that in future a citizen was quite free to sue any official for damages. But the reasonable fear lest this liberty should be abused has been too strong to allow the letter of the law to receive effect. In 1872 that judicial authority was delegated to the *Conseil d'Etat* which was destined to enable it to accomplish the task which it at once took up of shaping the law. At the same time the *Tribunal des Conflits* was reorganized as a court of supreme jurisdiction for the purpose of deciding conflicts as to competence between the courts of common law and the administrative courts. Now, the first decision of real importance given by this new court deals with actions seeking to make officials personally liable in damages. It might have been supposed that the courts of common law were going to open their doors freely to actions against agents of the government and were going to judge of their responsibility. But, on the contrary, it was at once perceived that this was impossible, because of necessity such actions and such an appreciation by the court of the official's liability had a close connexion with questions as to the authority of the State, and as to the public service. Take the case of a general in command of a besieged fortress who causes a citizen to be imprisoned. If, afterwards, this person complains of the measures taken against him and desires to obtain reparation by means of an action against the general, how is it possible to judge of the general's personal liability if he defends himself on the ground that he acted in a regular manner and within the limits of his authority? In reality the question is, first and foremost, one as to the extent of the general's authority, and a judgment upon that matter touches directly the authority of the State and the public service. Now, if we examine the legal basis of that administrative guarantee which the decree of 1870 affected to abrogate, we see that it is an application in the sphere of administrative law of the rule of separation of powers. Under the Constitution of the Year VIII application was given to this rule by two different prohibitions. The first of these, according to the general provisions of French public law, had for its object to take away from the courts of common law any right to inquire into or to interpret administrative acts. The second, which was laid down in art. 75 itself, was concerned with the administrators and was a prohibition against suing them without an authorization. It was only this second prohibition which the decree of 1870 could abrogate. The very institution of the *Tribunal des Conflits* is a proof that the first rule continued in force, being the consequence of the principle of separation of powers. It was still the law that a court of common law was bound to decline jurisdiction on the motion of the official who was the defendant, or, if the plea of " conflict " was entered, or even on its own initiative, until the *Conseil d'Etat,* which was the only court of competence to examine the legality of administrative acts, had given a decision on this point. It was in this sense that the *Tribunal des Conflits* gave its famous judgment of July 30, 1873, on the facts stated above in the case of the general, and this decision has never been overruled since and still governs the practice.[1]

The final result is that the problem concerning actions against officials have been solved in our public law in a very original manner. The practical effect of the decision in the case of *Pelletier* and the decisions in which that case has been followed, has been to resuscitate a genuine administrative guarantee. For whenever an official is sued personally by a citizen on account of an official act, the court of common law competent to deal with ordinary cases of civil liability cannot decide this case if there is any question as to the nature of the act complained of[2] until there has first been a judgment of the *Conseil d'Etat* declared competent in the matter by the *Tribunal des Conflits* to determine the character of the fault. The effect of this judgment may be to make the action competent in the court of common law.

It is in this way that in place of the primitive and arbitrary method of administrative guarantee secured by requiring the authorization of the government, there has been substituted the much safer method of an administrative guarantee secured by a court of law. And we must note further that even as regards the substantive law the law laid down in the case of *Pelletier* amounts to more than the pure and simple restoration of the rule of the Year VIII. *Pelletier's* case and the cases which follow it go further and protect a larger number of agents because the principle of these cases is not restricted in its application to the " agents of the government " mentioned in the Constitution of the Year VIII. But, after all, the great merit of the law as fixed by the decisions is that it entrusts to a genuine court of law quite independent of any other authority the business of separating those " faults " in respect of which officials may be sued for damages from the other faults for which no action can be brought against them. Upon what principle is this separation to be made ? On this matter also it is to judicial decisions that we must look for the rules, and it is by the study of the decisions and the definition which we find in them of *fait personnel* that we discover what are the faults in respect of which a member of the public can claim damages from an official, and in this way obtain reparation for an injury which he has sustained by an act of administration.

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[1] *Pelletier,* Dalloz Pér, 1874, i, 5. See on the whole question Dalloz, *Répertoire Pratique,* vo. *Compétence administrative,* no. 529 seq. ; Berthélemy, *Traité de Droit administratif,* 10me ed., p. 78 ; Duguit, *Traité de Droit Constitutionnel,* 2me ed., t. 3 (1923), pp. 290 seq. ; Hauriou, *Droit administratif,* 11me ed., pp. 315 seq. ; P. Cot, *La Responsabilité civile des Fonctionnaires publics* (Thèse), Paris, 1922 ; Jurisprudence: Cass. Civ., 17 nov., 1914, D.P. 1917, i. 120 ; Cass. Crim., 23 janvier, 1914, D.P. 1918, i. 7 ; *Conflits,* 19 nov., 1917, D.P. 1918, 3. i.

[2] By this is meant that if fault on the part of the agent is obvious the court of common law can deal with the case at once.

Personal Fault.—The principle of the "administrative guarantee" which now exists in France in virtue of the judicial decisions may be thus stated. An action for damages, brought against an official in a court of common law, is admissible only if it is in respect of an act which does not properly belong to administration—*qui ne pénétre pas la vie administrative*. If the question is concerned with administration it is for the judge of the administrative court to perform the process of "filtering" and the rules by which he allows certain suits to be brought in the courts of common law depend on the view which he takes of the acts incriminated. These may or may not be such as would make it proper to allow an action of damages in respect of them to be brought in the court of common law. From this point of view the rules of French public law may be stated in a simple form. There are two kinds of acts causing damages. In the first class of cases the damage is caused by an act of normal administration: the act is, so to speak, impersonal or abstract. Any other agent in the same circumstances would have done the same act. Here it is possible that the government department may be liable, subject to conditions which we shall study later, but the agent can never be personally liable. In the second class of cases the damage is caused by a special kind of act—concrete not abstract—by which a particular agent, in carrying out his official duties, has by his personal conduct caused the injury. Here we have a case of "personal fault," and this will render its author personally liable.

It remains, then, to give a definition of that "personal fault" which is the condition of this liability. Here the want of any statutory text involves naturally the want of any certain criterion by the aid of which we might find a definitive formula to describe the elements of this fault. We are on the shifting ground of judicial decisions, and the notion of *faute personnelle* has been elaborated bit by bit by one decision after another. For a long time legal writers have been seeking for a precise definition of this idea, and, after all, perhaps the soundest if not the most precise formula is that suggested by Laferrière as long ago as 1896: "personal fault is that kind of fault which reveals the man with his weaknesses, his passions, his acts of negligence." [1]

We may, however, as lawyers, endeavour to probe more closely this notion of personal fault. A review of the numerous decisions shows that where personal fault has been held to exist, this has been as a result of a number of considerations, some of them of a subjective character and others objective. The subjective considerations are involved in the very notion of fault. The administrative official is not liable personally unless it is found that he has been guilty of some kind of fault. But the decisions have given to this fault a qualification : the fault must possess a degree of gravity. The rule *in lege Aequilia et levissima culpa venit* does not here apply. Personal fault is of necessity *gross* fault, such as we find, for example, when the agent makes a gross mistake in his judgment as to the facts which lead him to act as he does, or as to the extent of his powers, or when he violates a penal law.[1] This subjective consideration may be sufficient to entitle the court to hold that there is personal fault when the alleged fault was in an executory decision taken by an administrative authority. If, however, the fault was not in a decision but in an act of execution, the subjective element becomes insufficient to indicate personal fault.[2] There must be some objective mark, and this the decisions express by saying that the act must be " detachable " from the agent's functions. Unless the act which caused the injury possesses this character of being detachable or separable from the administrative operation, the courts decline to consider it as a *faute personnelle*. This is quite natural, because, according to the doctrine of separation of powers, a court of common law cannot judge of an act which raises a question as to the propriety of an act of administration, but this prohibition falls to the ground when the act, although done by an official and even done in the course of his official duties, is, nevertheless, sufficiently removed or detached from these duties and forms in a sense a complete whole which the court can appreciate without trespassing on the domain of administrative activity. A few examples will show better than any abstract analysis what is meant by a " detachable " act.

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[1] *La faute personnelle est celle qui revèle "l'homme avec ses faiblesses, ses passions ses imprudences," Traité de la Juridiction administrative,* 2me ed., t. 1, p. 648.

It is part of the business of a mayor to post up the register of voters which corrects the former list of electors. If, by so doing, he causes damage to anyone there is no detachable act which could make him personally liable. But if the mayor causes a notice to be affixed at the side of the register indicating that a certain person has been condemned to imprisonment and is, therefore, disqualified from voting, this act done on his own initiative is " detachable " from the administrative act, which is all that is within the mayor's competence, and it may make him personally liable.[3]

Similarly, the administrative authority is charged with the duty of drawing up a list of doctors who may be called in by the police for urgent night duty, but if a mayor directs a police officer not to call in a certain doctor whose name is inscribed on the list, and the mayor does so, not out of regard for the public service, but from the personal desire to deprive the doctor of the benefit which he might obtain from being on the list (revealing in this way *l'homme avec ses passions*, as Laferrière puts it), this is an act detachable from the functions of the mayor, and is in the circumstances a *faute personnelle*.[1] One might multiply illustrations *ad infinitum*. The *Tribunal des Conflits* is continually deciding in cases of the most varied character whether the act incriminated is or is not "detachable." It is unnecessary to undertake a detailed account of these decisions, but it is important to make clear that the detachable character of the act which constitutes the objective element in *faute personnelle* is rather an external means of discovering fault than an intrinsic element of the fault itself. There are, in fact, many cases in which the courts have been led to find that personal fault has been proved where it is not possible to point to any wrongful act done by the official in connexion with an administrative act and yet distinct from it. These are the cases in which it is said that the fault is included in the act (*faute incluse*),[2] an expression which means that certain act of an official character may, in particular circumstances, contain in themselves an element of personal fault which will make their author liable for damages. A striking instance of this is when an official orders some act of execution upon the property or the person of a citizen outside the cases in which the law gives him authority to do this. In cases of this kind "the included" character of the fault makes it necessary that they should first be examined by the administrative court. This court alone is entitled to break the seal, if we may so express it, of the envelope constituted by the administrative act and to extract from it the fault which can then be judged of by the court of common law. Such is, in its main lines, the way in which French administrative law has admitted the personal liability of officials. It is clear that this is intimately connected with the general idea of the remedy open to individual citizens for obtaining reparation for injuries caused to them by the working of the administrative service. But this personal liability of the agents is of necessity very limited. It constitutes merely a minimum of protection and of reparation for the benefit of numbers of the public. But if we are to afford them any really serious protection against the loss which may be caused to them by acts of administration it is necessary to go further, and it is imperative that the government departments themselves, or, in other words, the State, should be declared responsible.

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[1] See Jèze, *Revue de Droit public*, 1909, p. 274.

[2] On the distinction from this point of view between an executory decision and an executory act, see Hauriou, *Droit Administratif*, 11me ed., 1927, p. 320.

[3] *Conflits*, 11 dec., 1909, Dalloz Pér, 1911, 3. 102.

We shall discuss in a subsequent article how this liability has been determined.

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[1] *Conseil d'État*, 8 mars, 1907, Dalloz Pér, 1908, 3, 5, and *Trib. Confl.* 7 dec., 1907, D.P. *ibid.*

[2] See Duguit, *Traité de Droit Constitutionnel*, 2me. ed., t. 3 (1923), p. 281.

(*To be continued.*)

ARBITRATION IN ENGLAND AND GERMANY,

A STUDY IN COMPARATIVE LEGISLATION AND CONFLICT OF LAWS.

[*Contributed by* DR. RUDOLF KAHN.]

Definition of Arbitration.—For the purpose of this inquiry "Arbitration" may be defined as the proceedings and determination of a dispute by a tribunal other than the ordinary courts of a country and competent to decide by agreement of the parties.

The general principles relating to arbitration are contained for England in the Arbitration Act, 1889 (52 & 53 Vict., c. 49) hereinafter called the Arbitration Act, and the Administration of Justice Act, 1920 (10 & 11 Geo. V, c. 81); for Germany in the tenth book of the *Zivilprozessordnung* of January 30, 1877 (hereinafter abbreviated *Z.P.O.*) as amended by later statutes.

For England the statutory provisions of the Arbitration Act are supplemented by the Common Law. The principles governing arbitration proceedings in both countries are either such as must apply or may be applied, or are to be applied by implication of law, if there is no provision to the contrary.

Outside our inquiry remain references to arbitration under special statutes [1] or by order of the court in default of consent,[2] in England, or reference by consent to an ordinary court as arbitrator [3] in Germany.

What Matters may be referred.—The Arbitration Act does not define what matters may be brought to arbitration, but the proposition seems to be that all disputes are referable to arbitration with the exception of cases where criminal matters or proceedings are involved, of a nature which the policy of English law would not permit to be compromised, or where charges of fraud are involved, or where the matter to be decided is contaminated by illegality.[4]

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[1] For England there are numerous special statutes, as *e.g.* Companies Clauses Act, 1845 (8 & 9 Vict., c. 16), Public Health Act, 1875 (38 & 39 Vict., c. 55), etc. For Germany Gerverbegerichtsgesetz, v. 29, Juli 1890; Gesetz betr. Kaufmannsgerichte, vol. 6, Juli 1904.

[2] Ss. 13, 14, Arbitration Act.

[3] Beschleunigungs Verordnung, v. 22, XII, 1923; see also Friedrich Stein, *Die Zivilprozessordnung für das Deutsche Reich*, 13th ed., vol. i, p. 1155.

[4] See Russell on *Arbitration and Awards*, 11th ed., p. 1, ss.; Roger T. Bacon, *Commercial Arbitration*, p. 22, ss.; Earl of Halsbury, *The Laws of England*, 1907, vol. i, p. 444.

By 1025 of the German *Z.P.O.* all matters of dispute as to legal rights may be referred to arbitration, provided that such disputes would, in default of arbitration, have been tried by the ordinary German civil courts[1] and the parties would have been entitled to compromise their subject-matter of dispute.

The distinction[2] between the subject-matters referable to arbitration under English and German law may be summarized as follows:

In the first instance, under German law no criminal matters, *even such as could legally form the subject of a compromise*, are referable to arbitration; but, on the other hand, actions in tort involving fraud may be tried by arbitration. It is further apparent that, the notions of crime and tort in both countries being different, they produce different effects in the subject-matter of arbitration. *E.g.* an indictment for non-repair of a highway cannot be referred to arbitration under English law,[3] because it is a criminal matter of a non-compromisable character, whereas in Germany it may be in case of non-feasance a matter purely for the administrative courts, and for this reason not be referable to arbitration.

On the other side the law relating to libel and slander, which forms an important part of the English Law of Torts, is under German law mainly of a criminal nature, and therefore not referable to arbitration. An award to the effect that one party shall beg the other's pardon would be impossible under German law because of its criminal nature.[4]

As to matters contaminated with illegality, I think the proposition is identical in both countries, subject to the differences in the conception of "illegality." This question touches also the validity and effects of a submission.

There is, however, one great distinction between the two systems of law as to what may form the subject-matter of an arbitration and this distinction is not very apparent on the face of the above definitions.

In German Law Reference must be of whole Matter in Dispute.—Under German law only such matters may be referred to arbitration as would otherwise form the subject-matter of a trial by a civil court.[5]

This means that the whole subject-matter of dispute must be submitted to the court for the purpose of a *condemnatio* defining the legal relationship of the parties. Mere elements of a subject-matter in dispute cannot be submitted to the decision of the German courts, and can, therefore, not form the subject-matter of an arbitration in the technical meaning. This may best be illustrated by a case decided by the Reichsgericht.[1]

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[1] This restriction, although not apparent on the face of 1025, *Z.P.O.*, is clearly established; see Stein, *Vorbem.*, II. 2 to 1025, vol. ii, p. 1024.

[2] Reference will be made sometimes to an article in *The Law Quarterly Review*, vol. xliii, p. 205, by Mr. E. C. Weiss on "Arbitration in Germany." I am unable to agree with Mr. Weiss on many important points. Professor A. Nussbaum, Berlin Editor of the *Internationales Jahrbuch für Schiedsgerichtswesen* (Berlin, Carl Heymanns, Verlag) dealt with some of Mr. Weiss's statements in vol. ii, p. 384, of his Yearbook.

[3] *R.* v. *Blakemore* [1850] 14 Q.B. 544.

[4] *Glover* v. *Barrie* [1699] 1 Salk 71.

[5] *Entscheidungen des Reichsgerichts in Zivilsachen* (in the following abbreviated *R.G.*), vol. 67, p. 73.

In the dissolution of a partnership, one partner was to take over the share of the other. In the course of the dispute as to the sums payable by the purchasing partner to the other, both partners agreed that an arbitrator should decide the value of the property belonging to the partnership. It was held that what purported to be an arbitration was not an arbitration in spite of what the partners may have termed it, because the subject-matter of the dispute was the purchase price of the share of the partner, and no German court could have entertained an action merely for the valuation of the partnership's property, seeing that this was only an element of the matter in dispute, namely the definition of the compensation payable to the other partner, and the arbitrator stands in the shoes of an ordinary court.

Declaratory Quasi-arbitrations.—This decision leads also to some remarks in respect of declaratory judgments under § 256, *Z.P.O.* The rule is, that no declaratory judgment may be sought unless the plaintiff can prove a legal interest in an early declaratory judgment, *i.e.* in other words that though he cannot yet ask the court for a judgment ordering the defendant to do some act, he has, nevertheless, a legal interest in an early declaratory rule for the future.

The position is here much the same as it was in England before October 1883, when it was provided by order XXV, r. 5, that the court was free to make binding declarations of right.[2] It follows, therefore, that an arbitrator cannot make an award of a declaratory nature, if the court could not have done so. But as long as there is a *prima facie* legal interest of the plaintiff in the early declaratory determination of his rights, an award may not be impeached for this reason, because the discretion as to the legal interest vests in the arbitrator as it would otherwise have vested in the court.[3] Such quasi-arbitrations—in German called *Schiedsgutachten*—follow the rules of arts. 317 ss. of the German Civil Code.[4]

Determination of Contractual Obligation.—As distinct from these cases which, for the above reason, cannot be arbitrations in the technical sense of German law, are to be mentioned the cases where either a third named person has to determine an obligation left undefined by the contract (s. 317, German Civil Code), or a third person has to declare with binding effect the as yet undefined contractual obligation of a party, which obligation, however, is definable by the provisions of the contract itself.[5] In the first case the third person may either have absolute discretion or only a judicial discretion. The first case is clearly not arbitration, and follows also the rules of arts. 317 ss. German Civil Code, but it seems that the latter case may under certain conditions form the subject-matter of an arbitration according to the intention of the parties. The conditions would be that the determination of the contractual obligation constitutes the whole subject-matter in dispute, and that there is some legal interest in an early declaratory award.

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[1] *Entscheidungen des Reichsgerichts in Zivilsachen* (in the following abbreviated *R.G.*), vol. 67, p. 73.

[2] W. Blake Odgers, *Principles of Procedure*, 5th ed., p. 205.

[3] *R.G.*, vol. 100, p. 121.

[4] *Ibid.*, vol. 96, p. 60.

[5] *Ibid.*

Under English law a similar problem arises, although an arbitrator would certainly be free to decide an element[1] being a component part of a subject-matter in dispute.

Distinction between Valuer and Arbitrator.—The problem here deals with valuations, and the problem is not less difficult than under German law. Here again we find that, as Neville J. puts it,[2] " you cannot make a valuer an arbitrator by calling him so, or *vice versa*."

Instances of agreements where parties agree to sell goods at a price fixed by a third person do not constitute real arbitrations under English law,[3] although they may lead to proper arbitration if, after a dispute as to the price having arisen, the dispute is referred for arbitration to a third person. Again, if a third person is intended only to use his own judgment and skill as a valuer without holding an inquiry in the nature of a judicial inquiry, he is only a valuer and not an arbitrator.[4] These are the general principles, but cases of an intermediate kind may present great difficulties. In view of *Chambers* v. *Goldthorpe* [1901] 1 Q.B. 624,[5] where no actual dispute had arisen before the award, I think there is a good ground for the submission that under English law, as under German law, no arbitration arises where a third party has to fix an obligation left undefined by the contract; but arbitration may arise where this third party has merely to declare the obligation arising under a contract and define it according to the intrinsic contents of the contract, and the proceeding is in the nature of a judicial inquiry, irrespective of whether the third person is to use his expert skill and knowledge or not.

Who may refer Matters to Arbitration.—(*a*) *English Law.*—" Every person who has a right of which he can dispose is competent to submit questions affecting that right to arbitration "[6] under English law. It may be of interest to consider shortly various classes of persons, where the right of disposal or capacity of acting may be questionable.

Married women are, since the Married Women's Property Acts, 1882 (45 & 46 Vict., c. 75) and 1893 (56 & 57 Vict., c. 63), as freely able to submit to arbitration as a *feme sole*.[7]

By common law an infant cannot submit to arbitration, except in the case of reasonable contracts for necessaries or service or contracts plainly for the benefit of the infant himself, and by the Infant's Relief Act, 1874 (37 & 38 Vict., c. 62), a ratification of a contract by the infant after attaining full age is equally voidable by the infant.

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[1] Bacon, *op. cit.*, p. 22.

[2] *Taylor* v. *Yielding*, 1912, 56; *Solic. Journal*, p. 253.

[3] Russell, *op. cit.*, p. 329.

[4] *In re Hammond and Waterton* [1890] 62 L.T. 808.

[5] See also *Tharsis Sulphur Co.* v. *Loftus*, 4. C.P.D., p. 148.

[6] Russell, *op. cit.*, p. 18.

[7] The rules relating to " restraint from anticipation " are mainly preserved by s. 1 of the Married Women's Property Act, 1893.

A bankrupt can submit to arbitration, but without affecting the creditors' rights. The trustees in bankruptcy may refer a particular case to arbitration with the permission of the committee of inspection.

A partner, although an agent of the firm, and his other partners for the purpose of the business of the partnership,[1] cannot bind the firm or his partners by a submission, because entering into a submission is no part of the ordinary business of a trading firm.[2] Actual authority or subsequent ratification, whether implied or expressed, is, however, sufficient.

Agents may submit on behalf of their principals to arbitration, if authorized to do so. The general common law rules as to agency are applicable. It seems that an agent can refer to arbitration in writing, although his own authority was only oral.[3] But to enter into a submission by deed, his authority must also be by deed.[4]

A solicitor has no implied authority to refer to arbitration before the action, but where an action is already proceeding such authority may be implied in respect of the subject-matter of the action.[5]

Counsel has full power to submit to arbitration matters properly belonging to the case,[6] but the court may set aside the reference, if counsel has acted against express instructions of his client even unknown to the other party.[7]

(*b*) *German Law.*—Under German law the general principles of the law of contract equally apply when determining the right and capacity to refer to arbitration. It may be worth while to contrast the principles laid down for the English law. The German law requires both capacity to act in law and the right of disposal.[8]

Infants under seven years and lunatics so found by inquisition are incapable of acting; the submissions of minors from seven to twenty-one years are void without the consent of their legal representatives, because a submission can never be merely beneficial within the meaning of § 107, B.G.B.[9] Women, either married or unmarried, are fully capable of acting in law, but married women cannot, as a rule, submit to arbitration without concurrence of their husbands, because under the Statutory Regime, § 1363, B.G.B., and most of the contractual regimes, the wife has not the right or sole right of disposal. A bankrupt can refer to arbitration, but without affecting the rights of the creditors (§ 7, *Konkursordnung* of February 10, 1877, with later amendments), otherwise the receiver in bankruptcy, with the consent of the committee of inspection, is solely entitled to refer (§ 133, s. 2, § 136, *Konkursordnung*).

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[1] S. 5, Partnership Act, 1890 (53 & 54 Vict., c. 39).

[2] *Stead* v. *Salt* [1825] 3 Bing, p. 103.

[3] Russell, *op. cit.*, p. 28; Bacon, *op. cit.*, p. 27.

[4] *Ibid.*, p. 29.

[5] *Ibid.*; Bacon, *op. cit.*, p. 28.

[6] *Matthews* v. *Munster* [1887] 20 Q.B.D. 141.

[7] Russell, *op. cit.*, p. 554.

[8] Stein, *op. cit.*, vol. ii, p. 1030.

[9] B.G.B. = German Civil Code.

In regard to agency the following broad principles may be mentioned. An authorized agent may refer to arbitration, a submission by an unauthorized agent requires ratification by the principal (§ 177, B.G.B.). In default of ratification the agent remains liable (§ 179, B.G.B.) There in an important right of the other party to the submission to call upon the alleged principal to declare his intention of ratification within two weeks of the date of the communication of the request, and any subsequent ratification is inoperative unless communicated within two weeks (§ 177, B.G.B.). It must also be noted that the German law does not recognize undisclosed agency. The power of an agent to refer may clearly be conferred orally and does not require any form (§ 1672, B.G.B.).

In the case of mercantile employees it is necessary to distinguish between *Procura* and other mercantile powers of agency. The holder of a *Procura* can refer (§ 49, H.G.B.),[1] whereas an ordinary mercantile agent cannot refer without express authority (§ 54, H.G.B.). A partner can under German law validly refer to arbitration as against the firm or other partners, and irrespective of his being properly authorized or not (§ 126, H.G.B.[2]) A German advocate is not by his retainer authorized to refer. This rule holds good, whether litigation has already been started or not.

Who may be Arbitrator.—(*a*) *English Law.*—Under English law it seems that the parties may appoint persons of any mental or physical imperfection, or even infants or lunatics, provided the parties knew the disability, or ought to have known it, when making the appointment.[3]

" The underlying principle is, that the parties choose their arbitrators for some good reason, and if they know or ought to have known, that they were not impartial in the ordinary sense of the word, it is no duty of the court to interfere." [4]

The following qualifications arise from the above general statement.

Disabilities in the person of an arbitrator will not affect an appointment if both parties know it or ought to have known it before the appointment, disabilities arising subsequent to the appointment, but before the opening of the hearing, may invalidate the appointment, provided the parties object either at the opening, if they knew the disabilities then, or at some later date.[5] There is no strict rule as to what interest or personal misconduct of the arbitrator is a disability, the principle being that in order to upset an appointment it must be "inequitable that the parties should be held bound by the agreement to accept his decision."[1] It is also noteworthy that an arbitrator may be a witness in the case submitted to arbitration,[2] but this seems only possible if an umpire has been appointed.

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[1] Handelsgesetzbuch of May 10, 1897, with later amendments.

[2] See Mittelstein in Nussbaum's *Yearbook*, vol. i, p. 39.

[3] Viner's *Abridgement*, "Arbitrement," A2, vol. iii, p. 41; Russell, *op. cit.*, p. 34; Bacon, *op. cit.*, p. 18.

[4] *Per* Lord Justice Bowen in *Jackson* v. *Barry Rly. Co.* [1893] 1 Ch., p. 247.

[5] Russell, *op. cit.*, p. 43.

It seems also to be recognized recently that where a reference is to arbitrators and an umpire, the arbitrators are allowed to act as advocates for the parties,[3] which tends to prove that each party may choose an arbitrator holding a similar view to his.

(*b*) *German Law.*—Under German law the same great latitude of choice of arbitrators is given as under English law. The only limits are that a party, or his representative in law, as *e.g.* a director of a company, cannot be an arbitrator,[4] though an agent may be one, and likewise a person not capable at all to act in law is excluded. But, corresponding to the position in English law, an appointment may be invalidated by either of the parties for the particular disabilities of being under age, deafness, dumbness,[5] or conviction of crime under special circumstances, or for undue delay caused by an arbitrator not named in the submission, and finally for the same reasons, and under the same conditions, as would entitle the party to object to a judge.[6] These reasons and conditions are defined by §§ 41–3, *Z.P.O.* But in the case of a judge the grounds enumerated in § 41, *Z.P.O.*, as *e.g.* relationship, marriage (also dissolved marriage) or previous committal to a certain view in the same cause render a judge unfit in law to act as judge in the same cause, and may, even after judgment, cause the judgment to be set aside (§ 579, s. 2, *Z.P.O.*); on the other hand, the reasons in § 42, *Z.P.O.*, which are, in the main, want of impartiality, entitle a party only to a challenge or objection, and this must have been made as soon as the party learns of the reason for the alleged want of impartiality; after judgment such objection cannot be taken at all, unless an objection taken during the proceedings was refused (§ 579, r. 3, *Z.P.O.*). But, on the other hand, in the case of an arbitrator these grounds of legal incapacity and objection stand on the same footing (§ 42, *Z.P.O.*),[7] so that it is clear that no ground for objection (including those grounds which would incapacitate a judge) can be taken into consideration after the award.[8] As to the time when grounds for objection must have arisen or have come to the knowledge of either of the parties, and when objection must have been made, the position is identical with English law. It is quite clear that members of the legal profession, and also judges, can act as arbitrators, and advocates especially frequently do.[1]

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[1] Russell, *op. cit.*, p. 39.

[2] In *Bourgeois* v. *Weddell & Co.* [1924] 1 K.B., p. 539.

[3] See note 2, *supra*, and *French Government* v. *Owners of s.s. "Tsurushima Maru"* [1921] 37 T.L.R. 961.

[4] Stein, *op. cit.*, vol. ii, p. 1028. Under English law it seems a party may act as arbitrator (*Matthew* v. *Ollerton* [1694] Comb. 218; also *R.G.*, vol. 93, p. 288).

[5] The defects of deafness and dumbness may equally incapacitate under English law (Russell, *op. cit.*, p. 35).

[6] § 1032, *Z.P.O.*

[7] *R.G.*, vol. 44, p. 391.

[8] Stein, *op. cit.*, 1041, *Z.P.O.*, N. 17, 18. Mr. Weiss, in 43 *L.Q.R.*, writes on p. 208: "If a party enters on the reference with a knowledge of any defect in an arbitrator, he is bound by the award, *but an award made with the assistance of an arbitrator who might have been challenged had the parties known of any grounds for so doing, can be set aside.*" This, I submit, is wrong, as shown above. And again, p. 210: "The following case may serve as an illustration of this peculiar position.

Suppose A was appointed by one of the parties, the award is made and nothing seems to be wrong. The award is enforced after an order has been obtained and then, five years afterwards, the other party discovers that the arbitrator was related to the party that appointed him. An action for setting aside the award may be brought within one month. What becomes of the maxim *Quieta non movere* ?"

[1] Mr. Weiss writes on p. 207: "The German courts have, in particular, *regularly set aside* awards made by practising lawyers, and even, frequently, such made by lawyers in the employ of a trade association. As recently as 1926 the Supreme Court at Leipsic dismissed an action by a judge who sued for his costs incurred as arbitrator in an arbitration. The Supreme Court thought that it was incompatible with the duties of a judge to act as arbitrator in the employ of private parties! Surely a view which is not easily comprehensible to an English lawyer, but which is readily intelligible in the light of certain abuses occasionally found in the arbitration in Germany (see, for the decision, *Juristische Wochenschrift*, 1926, p. 1569)."

This statement is most incorrect. Quite apart from the fact that the courts cannot set aside an award, except for special reasons (see later) I have not found any decision where an award has been set aside because of the concurrence of a lawyer or a judge. Mr. Weiss cannot give any authorities for such a statement. The position of an arbitrator under German law is surely not that of an employee, but, as *R.G.*, vol. 94, p. 212, puts it, that of an independent judge, freer than an ordinary judge, but likewise impartial and unprejudiced. The contractual relationship between arbitrator and parties is of a singular nature and is neither agency nor employment (*R.G.*, vol. 41, p. 251; vol. 59, p. 247; vol. 74, p. 323); but the principles of agency or employment may come in as far as applicable in the question of remuneration of the arbitrators and their liability to make an award. Under English law the position is similar and one infers an implied promise to pay remuneration (*Brown* v. *Llandovery Terra-cotta Co., Ltd.* [1909] 25 T.L.R. 625). In the decision quoted by Mr. Weiss (*J.W.*, 1926, p. 1596), where an executor of a deceased judge claimed for remuneration due for an award, the issue was that the defendants alleged that the judge originally dealing with the matter in his judicial office had caused it to be referred to him as an arbitrator for the sake of remuneration. These serious allegations would have, if proved, rendered the contractual arrangement as to remuneration of the arbitrator illegal and void, as being against public policy. Nevertheless, the award would remain valid. (This shows clearly the distinction in the contractual relationship of parties and arbitrators, as to the arbitration itself and other incidentals.) Now in this very decision the *Reichsgericht* says literally: "In accordance with the view of the Court of Appeal, there is no objection to a judge accepting the position of an arbitrator or umpire in an arbitration for reasonable remuneration, if and as long as the independence of a judge and the administration of justice are not prejudiced. But there must not be created a kind of dependent and paid relationship. As a rule the conditions are satisfied if the arbitration is undertaken only for the single case, and not permanently for the same parties, and if the judge and the parties are at any time free in their acceptance and their choice." As one observes, these and the following remarks deal only with the etiquette of the German bench and would certainly be observed equally by an English judge. They do not touch the validity of an award. Mr. Weiss has here made a grave mistake.

Also administrative bodies may be arbitrators, if this is compatible with their public duties.[1] It is equally possible to refer to a judge (not named) of a certain court, in which case the holder of the office in his capacity as a private individual is referred to.[2]

Effect of the Submission and Revocation of a Submission.—(*a*) *English Law.*—The submission and its effects under English law are the subject of highly developed rules.

I. S. 27 of the Arbitration Act defines " submission " : " Unless the contrary intention appears," it " means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named or not." The definition is somewhat inaccurate, for, *e.g.*, s. 1 of the Act cannot include an agreement to refer future differences, but must necessarily only apply to an agreement to refer existing disputes to a named arbitrator, *i.e.* be a " submission " as it was understood before the Act. These technicalities, although of great importance to English law, are not of interest to our present inquiry, which in addition is only confined to the law at present. As it appears by the definition, the agreement must be in writing, which may be by correspondence or even by incorporation of another document containing the clause. Signature may be necessary by the party to be charged if it comes within the Statute of Frauds or the Sale of Goods Act. A corporation can as a rule only refer under its common seal. A parol submission is nevertheless valid, although it does not come under the Act. But their great disadvantages are the possibility of disputes as to the exact terms used, that they cannot be enforced by attachment [3] and that they can be revoked at any time before the award is made.[4] It is noteworthy in this connexion that a general agreement in writing to refer future disputes to one or more persons to be appointed and a subsequent parol submission in pursuance of the general agreement remains a parol submission and does not come within the Act.[5] Therefore also the submission of a present dispute must be in writing, or at least the appointment of the arbitrators must be so.

S. 1 of the Arbitration Act deals with the revocation of a submission. The terms are : " A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or a judge, and shall have the same effect in all respects as if it had been made an order of court." [6]

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[1] Case of a *Provinziallandtag* in *R.G.*, vol. 13, p. 407.

[2] *R.G.*, vol. 53, p. 1 ; vol. 94, p. 112, deal with the appointment of arbitrators by the holder of a judicial office.

[3] *Ansell* v. *Evans* [1796] 7 T.R. 1.

[4] Russell, *op. cit.*, p. 48.

[5] *Ibid.*, p. 53 ; *In re Maitland and Glaysher* [1864] 3 H. & C. 442.

[6] A submission which does not come within the Act is revocable at common law and cannot be made irrevocable. This is the rule as to parol submissions (submission in the sense of the authority of an arbitrator, because the agreement to refer is never revocable, and its breach may give rise to an action for damages (Russell, *op. cit.*, p. 48).

The object of this section is to make a submission irrevocable, except by leave, and to make the arbitrators' award in the same way enforceable as before in the case of a submission made a rule of court.

The court, in granting leave to revoke a "submission," *i.e.* the authority of an arbitrator, will exercise its judicial discretion and considerations come in, *e.g.* as whether the proceedings would be prolonged by leave being granted,[1] or whether the application is the means of obtaining an authoritative decision.[2]

Revocation has lost considerable ground since s. 19 of the Arbitration Act provides that an arbitrator may be directed to state a special case during the proceedings on any question of law. Therefore the court will not be induced, except under special circumstances, to give "leave to revoke unless a case is stated."[3] Excess or refusal of jurisdiction by arbitrators or misconduct of arbitrators form the chief grounds for granting leave to revoke. Sometimes revocation may be the only means of preventing a substantial miscarriage of justice, as where an arbitrator received evidence as to claims not within his jurisdiction, and the award could not have been set aside. Misconduct means legal misconduct, as *e.g.* irregularities in proceedings. Disqualification of an arbitrator by interest after his appointment may again be a ground for revocation.[4]

Death of either party before the making of the award revokes in the absence of a contrary provision in the submission, therefore clauses to the contrary are usually inserted into a submission. Bankruptcy does not, of itself, operate as revocation, but it may be sufficient ground for the court to grant leave for the other party to revoke.[5] Another means of defeating a submission for the time being may be by injunction restraining a party from proceeding to arbitration until by separate action the validity of the instrument containing the arbitration clause is determined.[6] This very rare equitable remedy may also be applied to restrain an action in a foreign court in the case of an arbitration clause making the award a condition precedent, when English law was applicable to the contract.[7]

II. By s. 2 of the Arbitration Act, which reads:

> A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule of this Act, so far as they are applicable to the reference under the submission.

The provisions of the First Schedule are therefore included, unless a contrary intention is clearly expressed. These provisions will be considered later in their proper place.

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[1] *Steamship Den of Airlie & Co., Ltd.* v. *Mitsur & Co. Ltd.* [1912] 106 L.T. 451.

[2] *In re Gerard (Lord) and London & North-Western Rly. Co., Ltd.* [1894] 1 Q.B. 459.

[3] *Tabernacle Permanent Building Society* v. *Knight* [1892] A.C., p. 301.

[4] *In re Baring Bros. and Doulton & Co.* [1892] 61 L.J.Q.B. 704.

[5] *Marsh* v. *Wood* [1829] p B & C. 659.

[6] *Witt* v. *Corcoran* [1871] 8 Ch. App. 476.

[7] *Pena Copper Mines, Ltd.* v. *Rio Tinto Co., Ltd.* [1912] 105 L.T. 846.

Otherwise a submission may contain any provisions the parties desire, unless they are contrary to public policy or oust the jurisdiction of the court.[1] The following provisions were not considered to oust the jurisdiction of the court:

No action shall be brought until an award has been made.[2]

Neither party shall apply to the court to direct the arbitrator to state a special case for the opinion of the court.[3]

The effects of a valid submission are described by s. 4 of the Arbitration Act, which provides:

> If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the action, apply to that court to stay the proceedings, and that court or judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Under this section the court has a discretion to stay the proceedings or to try such disputes itself, unless the award was made a condition precedent to an action. In such case the court may as well stay an action, but if the action proceeds, this clause gives a complete defence.[4] The court may also refuse to stay the action where a substantial part of the action does not fall within the submission or where the arbitrator can only decide as to the quantum, but not as to the liability.[5] Also if a case is made out that the contract containing the arbitration clause is repudiated, the court will refuse a stay. Generally the leaning of the court is to stay the action and the burden of showing cause why the action should not be stayed is upon the party opposing the application to stay.[6] The chief grounds for the discretion of the court to refuse to stay an action are, that charges of a personal character are involved, or chiefly questions of law are in dispute or bias of an arbitrator.[7]

In addition to granting a stay, the court may give auxiliary relief, *e.g.* by appointment of a receiver or by granting an injunction.[8]

(*b*) *German Law.*—The submission and its effects under German law are, in comparison with the English rules, of a very simple nature. The agreement to refer to arbitration the so-called *Schiedsvertrag* (see §§ 1026, 1028, *Z.P.O.*) is not defined by German law, but in accordance with the

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[1] Russell, *op. cit.*, p. 56.

[2] *Scott* v. *Avery* [1856] 25 L.J. Ex. 308.

[3] *In re Montgomery, Jones & Co. and Liebenthal Co.* [1898] 78 L.T. 406.

[4] *Harrowby* v. *Leicester Corporation* [1915] 85 L.J. Ch. 150.

[5] Russell, *op. cit.*, p. 60.

[6] *Denton* v. *Legge* [1895] 72 L.T. 626.

[7] Russell, *op. cit.*, p. 106.

[8] *Ibid.*, p. 119.

English law it embraces an agreement to refer future or existing disputes to arbitration, whether an arbitrator is named or not (§§ 1025, 1026, 1028, 1031, *Z.P.O.*). The contract may be parol, if it is so valid according to the general rules of the German Civil Code. But a party to a valid parol submission may request the other party to constitute the submission in writing (§ 1027, *Z.P.O.*). This right may be specifically enforced by action.[1] A general agreement to refer future disputes is only valid if it refers to future disputes arising out of a certain and distinct legal relationship between the parties. This is different from English law, where it is possible to refer, as it seems, for the future all matters in difference between the parties.[2]

Where according to the general principles of the German law writing is necessary, *e.g.* §§ 566, 581, B.G.B., it is necessary that the instrument containing the submission should be contained in one signed document; correspondence would seem to be insufficient (126 B.G.B.).[3]

The power of the court under German law to grant leave to revoke a submission is much narrower than under English law. By the rules of the German Civil Code it seems that the authority of an arbitrator is equally revocable as by English law,[4] but by the express provisions of § 1030, *Z.P.O.* a party to a submission is bound as soon as the notification of the appointment of the arbitrator is received by the other party. If the appointment is already contained in the arbitration clause and made by mutual consent of the parties to the submission (§ 1033, *Z.P.O.*) different and even stronger considerations arise (see *infra*). The court, under English law, has power to grant leave to revoke the submission, *i.e.* the authority conferred upon the arbitrator, which revocation in fact although not theoretically invalidates an agreement to refer, and in so doing considerations may be taken into account by the court some of which have nothing at all to do with the person itself of the arbitrator, as *e.g.* legal misconduct, convenience and expense, excess of jurisdiction by arbitrator.

The court, under German law, decides on the application of a party whether a submission is to be revoked or not (§ 1045, *Z.P.O.*), but only such considerations enter into the judicial discretion of the court as are strictly personal to the arbitrator (§ 1032, *Z.P.O.*), and such revocation does not in fact invalidate an agreement to refer (§ 1031, *Z.P.O.*) except where the authority of an arbitrator is revoked who by mutual agreement of the parties was appointed arbitrator in the agreement to refer (§ 1033, *Z.P.O.*), unless the parties have made a provision to the contrary.

Revocation of a submission, *i.e.* the authority of an arbitrator, but not of the agreement to refer arises apart from the decision of a court, if an arbitrator not appointed by consent in the agreement to refer dies or refuses to become arbitrator or to arbitrate, or is otherwise prohibited. In such case a new arbitrator is to be appointed in his place (§ 1031, *Z.P.O.*).[1] If, however, an arbitrator or arbitrators appointed by consent in the agreement to refer die or refuse to become arbitrators, or rescind their contract to arbitrate, or delay the performance of their duties unduly, or if an even number of arbitrators generally are unable to form a majority, not only the submission, but also the agreement to refer becomes void subject to provisions to the contrary (§ 1033, *Z.P.O.*). To this special class of arbitrators there is nothing corresponding under English law.[2] In practice the parties insert a provision that a third arbitrator is to be appointed, as the German law does not officially recognize an umpire.

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[1] Stein, *op. cit.*, vol. ii, p. 1035.

[2] Russell, *op. cit.*, p. 80.

[3] Under English law correspondence is sufficient if the submission falls within the Statute of Frauds. For the position under German law see also Mittelstein in Nussbaum's *Yearbook*, vol. i, p. 41, and *R.G.*, vol. 68, p. 186.

[4] *R.G.*, Warneyer, 1912, No. 369.

The death of a party before the award under English law may best be compared in its effects and the possibility for the parties to provide to the contrary with the annulation of a submission under § 1033, German *Z.P.O.* Under German law death of a party does not affect a submission at all,[3] unless the submission is in respect of personal injuries, as §§ 847, 1300, B.G.B. (*actio personalis moritur cum persona*). Neither does bankruptcy invalidate a submission, although the bankrupt cannot bind his creditors after a receiving order (§ 7, *K.O.*). A submission may also be revoked if the instrument containing the arbitration clause is impeached. But the determination of the legal validity of this instrument by the ordinary courts (§ 1045, *Z.P.O.*) must not interfere and especially not delay the arbitration proceedings, so that an injunction to restrain parties to proceed as under English law never lies by the express provisions of § 1037, *Z.P.O.* The reason is that a revocation of the submission by order of the court even subsequent to an award renders this award ineffective.[4]

As to the contents of the submission there does not exist a "first Schedule," but the provisions of the *Z.P.O.* are applicable, if a submission leaves a gap, where the provisions of the Code provide a solution, as *e.g.* §§ 1028, 1038, *Z.P.O.* Under German law there is no doctrine developed as to the ousting of jurisdiction of the courts,[5] but it seems that parties to an arbitration cannot validly renounce their rights to apply to the courts for an injunction.[1]

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[1] The position is similar under ss. 5, 6, Arbitration Act.

[2] Mr. Weiss, in 43 *L.Q.R.*, p. 208, states the position inaccurately because he omits the element of consent in the appointment of the arbitrator named in the submission; see Stein, vol. ii, p. 1042. The underlying idea is that the parties may have referred in reliance on, and confidence in, some special arbitrators. (See also Nussbaum, *Yearbook*, vol. ii, p. 397.)

[3] See Engelmann, *Das Bürgerliche Recht Deutschlands*, 1913, p. 216, §§ 672, 675, B.G.B; Enneccerus Kipp Wolff, *Lehrbuch des Bürgerlichen Rechts*, 1913, vol. i, p. 588; Stein, *op. cit.*, vol. ii, p. 1033 n. 61.

[4] Stein, vol. ii, p. 1076.

[5] Under German law an arbitration clause may be contained in a will (Stein, vol. ii, p. 1078). Under English law such clause would be invalid (*Phillips* v. *Bury* [1695] Skin. 469).

The courts under German law have no discretion to stay proceedings, but the courts must stay and give judgment for the party who opposes the trial and has made out a case of valid submission (§§ 274, sect. 3, 275, *Z.P.O.*)

The judgment given for the defendant after having proved his objection does not decide the case on its merits, but disposes of it, as far as the courts are concerned, for the time being, until the submission may become void.[2] In broad principles it seems, therefore, that a submission under German law has, as regards "staying proceedings," the same effect as an arbitration clause under English law, which makes arbitration a condition precedent. Under both systems of laws the right to insist on arbitration may be waived by the parties.[3]

Conduct of a Reference.—(*a*) *English Law.*—As to the conduct of arbitration proceedings, which may vary according to the provisions of the submission, we shall consider what rules must be followed, in order to render an award valid, and what rules are provided for by statutes if the submission does not exclude them and does not regulate the procedure itself. In addition we shall have to observe also how far the courts are able to interfere with or influence the arbitration proceedings.

Under English law, if the submission does not contain a provision as to the number and the mode of appointment of the arbitrators, and the First Schedule is not excluded, the reference is to a single arbitrator.[4] If the First Schedule is, however, excluded, and no provisions are contained in the submission, a deadlock arises and in default of written consent the arbitration cannot proceed. If the reference is by application of the First Schedule to a single arbitrator, and the parties do not, after differences have arisen, concur in the appointment of an arbitrator, any party may serve the other party with a written notice to appoint an arbitrator, and if the appointment is not made within seven clear days after the service of the notice the court or a judge may, on application by the party who gave the notice, appoint an arbitrator (s. 50 of the Arbitration Act). The same procedure applies, if the appointed single arbitrator refuses to act or is incapable of acting or dies, unless the submission shows that it was intended that the vacancy should not be supplied[5] (s. 5 (*b*) of the Arbitration Act).

If the reference is to two arbitrators and the First Schedule is not excluded, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award (the First Schedule (*b*)). If they fail the same procedure as above applies. Notice to be served from arbitrator to arbitrator (s. 5 (*c*) Arbitration Act) and the same applies if the appointed umpire refuses to act, etc. (as in s. 5 (*b*) Arbitration Act). But as the two arbitrators have power to appoint an umpire during such time as they have power to make an award, and as they are at liberty to enlarge the time for making an award under clause (*c*) of the First Schedule it would seem that the power of the court to appoint an umpire under s. 5 (*c*) of the Act may become inoperative.[1]

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[1] Stein, vol. ii, p. 1032; *R.G.*, 30, 322.

[2] *Ibid.*, vol. i, p. 715.

[3] § 274, *Z.P.O.*; *Toronto Rail Co.* v. *National, etc., Insurance Co.* [1914] 20 Com. Cas. 1.

[4] First Schedule (*a*).

[5] This would correspond with the position under German law of an arbitrator appointed by consent in the submission (§ 1033, *Z.P.O.*).

If a submission is to two arbitrators, one to be appointed by each party, and the submission does not express a contrary intention, the party who appointed an arbitrator may appoint a new arbitrator in his place, if the arbitrator refuses to act, or is incapable of acting or dies (s. 6 (*a*) Arbitration Act). But if on a reference to two arbitrators one party fails to appoint an arbitrator, either originally or by way of substitution, the party having appointed his arbitrator may give seven clear days' notice to the other party in default, and after such time, if the appointment is not made, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, provided that the court may set aside any such appointment (s. 6 (*b*) Arbitration Act).

The appointment of an arbitrator under this section is not complete until it has been notified to the other side,[2] and it would seem that the power of the court to set aside an appointment under this section applies only to a sole arbitrator, who, having been set aside as such, remains arbitrator for the party.[3] Where a submission is to three arbitrators, one to be appointed by each party, and the third to be appointed by the two arbitrators, the position is similar (s. 16 of the Administration of Justice Act, 1920, 10 & 11 Geo. V, c. 81). But it is worth mentioning that the court may, on application of a party who served notice upon the arbitrators to appoint the third arbitrator, exercise in the place of the two arbitrators the power of appointing the third arbitrator.

The difference between the position of an umpire and arbitrator is in outline this: The third arbitrator must act together with the other two arbitrators. He must be present at each meeting and witnesses and parties must be examined in the presence of them all,[4] and they should execute the award at the same time and place, and failure to do so may invalidate the award, subject always to the parties not having provided differently. The function of the umpire, however, begins when the functions of the arbitrators cease. Clause (*d*) of the First Schedule provides:

> If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission or to the umpire a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

[1] Russell, *op. cit.*, p. 130.

[2] *Tew* v. *Harriss* [1848] 11 Q.B. 7.

[3] Russell, *op. cit.*, p. 139.

[4] *Lord* v. *Lord* [1855] 26 L.J.Q.B. 34.

But in practice and in order to save expense and delay it is often arranged[1] that the umpire is to sit with the arbitrators from the commencement of the action, but he is not to interfere at such stage.[2] Otherwise the umpire would have to hear the evidence over again, as in default of consent of both parties he would not be allowed to use the notes of the arbitrators.[3] This is the position, however, where in practice the arbitrators act as counsel, and the umpire acts as sole arbitrator.[4] Sometimes an appeal committee is constituted to hear appeals from the awards of an arbitrator. Such appeal committee is in law considered as an umpire.[5]

By clauses (*f*) and (*g*) of the First Schedule (if not excluded) the arbitrators are empowered to examine the parties, and the witnesses on oath or affirmation, and may require the parties to produce relevant books and papers, etc., within their possession or power. They " are, like other judges, bound, when they are not expressly absolved from doing so, to observe in their proceedings the ordinary rules which are laid down for the administration of justice."[6] They are as a general proposition bound by the rules of evidence,[7] although a not too minute observance of the regularity of forms should be insisted upon.[8] The proceedings bear so much of a judicial character that witnesses can be compelled to attend and are free from arrest.[9] An arbitrator must not hear a party or his witness in the absence of the other party or his representative,[10] and must not receive secret information from one side. The arbitrator has, in the absence of express provision in the submission to the contrary, to decide the questions submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable under the circumstances.[11]

If an arbitrator decides erroneously as to a question of law, but honestly, that is not in itself such misconduct as to set an award aside, unless the improper decision amounts to a miscarriage of justice.[12] In commercial arbitrations, as has already been mentioned, the arbitrators present the evidence to the umpire and act as advocates.

Unless a contrary intention is expressed in the submission the arbitrators or umpire may state an award as to the whole or part of the submission in the form of a special case for the opinion of the Court (s. 7 (*b*) Arbitration Act).

This is in the absolute discretion of the arbitrator or umpire under this section, and refusal does not amount to misconduct. The award stating a special case must set out all the facts necessary for the court to give the decision on the point of law, and if the position admits of an alternative decision, the award should be alternative and so final that the court has merely to decide the law in one of the alternatives, whereupon the award of the arbitrator takes effect automatically according to the view adopted by the court.[1] The arbitrators or umpire, after having stated the award in the form of a special case become *functi officio*, but an award may be remitted to them for reconsideration (s. 10 Arbitration Act) when their functions will revive. The special case under this section will be set down for hearing in different ways depending whether it comes on in the King's Bench Division or Chancery Division.[2] By s. 19 of the Arbitration Act "Any referee, arbitrator or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the court or judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference." Under this section an arbitrator may be compelled by the court to state a case on application of a party. It is not misconduct for an arbitrator not to state a case provided he gives either party opportunity to make the application to the court.[3]

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[1] Bacon, *op. cit.*, p. 16.

[2] Russell, *op. cit.*, p. 428.

[3] *In re Jenkins* [1841] 11 L.J.Q.B. 71.

[4] This position is disapproved by Russell, p. 422, quoting cases.

[5] *Keighley, Maxted & Co.* v. *Bryan, Durant & Co.* [1893] 1 Q.B. 405.

[6] *Haigh* v. *Haigh* [1861] 5 L.T. 507.

[7] *In re Enoch and Zaretski, Bock & Co* [1910] 1 K.B. 327.

[8] *Andrews* v. *Mitchell* [1905] A.C. 78.

[9] Russell, *op. cit.*, p. 145.

[10] *Ibid.*, p. 374.

[11] *Ibid.*, p. 376.

[12] *Hagger* v. *Baker* [1845] 14 L.J. Ex. 227; Russell, *op. cit.*, pp. 375, 398.

It seems that the parties may validly stipulate in the submission that the court should not be consulted by way of stating a case, and that this does not oust the jurisdiction of the courts.[4] Also under this section the case has to state the facts on which the decision of the court on points of law is sought. The decision of the court under this section is merely consultative, and the arbitrator has to give his final award according to the court's opinion on the point of law raised. No appeal lies against the opinion of the court as such.

The last power of the court before the making of the award, which we have to consider here, is the power of the court to remove the arbitrator (s. 11–1, Arbitration Act). Ground for removing is his misconduct. What may constitute misconduct we shall deal with later when we have to consider the setting aside of an award for misconduct of an arbitrator. But misconduct such as to give ground for a removing can naturally only be such misconduct as appears before the making of an award.

Finally, the question of time is to be mentioned. If clauses (*c*) and (*e*) of the First Schedule are not excluded the arbitrators must make their award within three months, and the umpire within one month after entering on the reference, but they may both extend the time for making the award by any writing signed by them. This power must, however, be exercised before the expiration of the original period, afterwards only the court can extend the time. (S. 9 Arbitration Act.[5])

(*b*) *German Law.*—We turn now to consider the proceedings from the submission until the making of the award under German law.

If the submission does not contain a provision to the contrary, the reference is to two arbitrators (§ 1028, *Z.P.O.*) each appointed by a party. A party who has appointed his arbitrator may request the other party in default to appoint an arbitrator within one week from the receipt of the notice in writing to this effect. This notice is also to contain the name of the arbitrator appointed, by the party giving notice (§ 1029, *Z.P.O.*). If the appointment is not made in time, the court is to appoint the arbitrator, on the application of the party not in default (§ 1029, *Z.P.O.*). The power of the court does not arise if the arbitrators are to be appointed by both parties together or by a third person.[1]

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[1] *Larrinaga* v. *Société Franco-Americaine* [1922] 38 T.L.R. 739.

[2] Russell, *op. cit.*, p. 151.

[3] *In re Palmer & Co. and Harkenx & Co.* [1898] 1 Q.B. 131.

[4] Russell, *op. cit.*, p. 316.

[5] See also Russell, *op. cit.*, p. 163.

A party is bound by the appointment made as soon as notification of the appointment is received by the other party (§ 1030, *Z.P.O.*). It is of importance to note that a notification and request by one party to another to appoint an arbitrator interrupts the running of the period of limitation or prescription (§§ 220, 942, B.G.B.).[2]

Again, we find in § 1031, *Z.P.O.*, similar to the provisions in s. 6 (*a*) of the Arbitration Act, a provision empowering a party to appoint a new arbitrator in the place of an arbitrator who after appointment dies, or became incapable of acting, providing that he was not an arbitrator appointed by consent in the submission. If a party does not appoint a new arbitrator after request, application may be made after a week's time to the court by the other party for the appointment of a new arbitrator. The German law does not officially recognize a third arbitrator or umpire, and provisions for their appointment must be contained in the submission. One observes, also, that the German law makes regulations only in respect of the statutory position of two arbitrators, each to be appointed by a party, but does not provide at all for a single arbitrator and emergencies arising therefrom. In the case of two arbitrators, at variance with English law, the arbitrator is appointed by the court, if a party is in default. If the two arbitrators cannot agree, the submission is revoked (§ 1033, s. 2, *Z.P.O.*). It seems that the underlying idea of the Code is that in a normal case the parties want the case to be decided by arbitrators who have their confidence and appointed by them, *i.e.* by each separately. If these two persons of confidence cannot agree, the probable intention of the parties is to go to court.[3]

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[1] *R.G.*, 108, 246. If under English law by the statutory rule (clause (*a*) of First Schedule) the reference is to a single arbitrator and by the submission this arbitrator is to be appointed by a third person, and the arbitrator so appointed refuses to act, then it seems the court has power to make the appointment by virtue of s. 5 (*b*) of the Arbitration Act (Russell, *op. cit.*, p. 127). But it seems that where the third person refuses to appoint, the English court has equally no power to appoint.

[2] Under English and German law a submission may already avoid limitation if the submission is unqualified enough (see Darby and Bosanquet, *Statutes of Limitations*, 1893, p. 100; § 208, B.G.B.). But otherwise, arbitration proceedings will not affect the running of the period of limitation under English law.

[3] This position is very much criticized by Mr. Weiss (43 *L.Q.R.*, p. 208) as a "very extraordinary provision." But the same position occurs in the French *Code de Procédure Civile*, 1612, s. 3, and in the laws of Spain, Japan and Austria. See Nussbaum, *Yearbook*, vol. ii, p. 397. See also footnote 4 on page 77.)

It is therefore usual for the parties to make express provisions as to a third arbitrator in the submission, if they so desire.[1]

When dealing (on p. 69) with the revocation of a submission under German law we have already seen that a valid objection to an arbitrator appointed by consent of the parties in the submission revokes the submission in the same way as disagreement of two arbitrators in default of a provision to the contrary in the submission. We have now to mention the cases of objection to an arbitrator not appointed by consent and/or in the submission. These are the cases nearest approaching to a removal in the meaning of English law. But whereas under English law a removal by the court takes place for misconduct, which includes such a wide ground as the arbitrator's breach of duty to behave fairly to each party and to act within his authority and according to the principles of justice,[2] and the English court may restrain an arbitrator by injunction from acting where he is in the opinion of the court guilty of misconduct,[3] under German law there is no removal in the strict English sense. All the court does upon application is to declare that an arbitrator is validly objected to[4] and only grounds of personal disqualification, such as interest and lack of impartiality, will be taken into consideration (§ 1032, *Z.P.O.*), or unreasonable delay. In addition, the German court has no means of restraining an arbitrator unfit in its opinion to act, but the arbitrators may continue to act, if this should be actually feasible (§ 1047, *Z.P.O.*). The award in such a case would presumably be set aside (§ 1041, s. 1, *Z.P.O.*). There is nothing under German law corresponding to a case or special case stated.

The general position of an arbitrator under German law is like that of a judge, and his judicial and impartial acting is essential.[5] He is liable to the parties for an intentional breach of his duty, *i.e.* malice.[6] It seems that under German law an arbitrator has greater latitude in applying the law than an English arbitrator has,[7] because, according to German law (1042, *Z.P.O.*) the only limits are that an arbitrator does not intentionally deviate from such provisions of the German law as are *jus cogens* and the breach of which could not validly have been waived by the parties. Provisions of this nature in the interest of public policy are, *e.g.*, the rules as to gaming and wager.[8] Such intentional disregard may be presumed if the arbitrator, on hearing arguments, fails to inquire sufficiently. In contrast to the limitations imposed upon the arbitrator under English law the German limitations are confined to those absolutely necessary in the interests of public policy.

Under English law an arbitrator commits misconduct if he intentionally disregards the law to be applied[1]; under German law an award may be set aside if an arbitrator disregards *jus cogens*. Under German law, in fact, the old English rule of practice, followed when revocation is sought, applies that parties submitting to a reference take the arbitrator with his law good or bad, for better for worse,[2] and it is no miscarriage of justice for a party to be injured by bad law which he has agreed to be bound by.[3] And this, I think, is one of the main reasons why a submission is revoked under the German statutory rule,[4] if two arbitrators of the parties' choice fail to agree.

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[1] See Mittelstein in Nussbaum's *Yearbook*, vol. i, p. 42.

[2] Russell, *op. cit.*, p. 204.

[3] *Beddow* v. *Beddow* [1878] 9 Ch.D. 89.

[4] §§ 1045, 1032, *Z.P.O.*

[5] *R.G.*, vol. 94, 212.

[6] *R.G.*, vol. 65, p. 175; Stein, *op. cit.*, vol. ii, p. 1044.

[7] Russell, *op. cit.*, p. 376.

[8] §§ 63, 65, Börsengesetz of May 27, 1908.

In regard to the rules of procedure and evidence the parties are in the first instance entitled to make binding provisions in the submission, the breach of which may afterwards cause the award to be set aside, *e.g.* if parties have stipulated that the case should be tried by hearing evidence, and the trial is, notwithstanding that, conducted by writing.[5] But if the parties do not make any provision,[6] the arbitrators have an absolute discretion by law to make their own rules of procedure. They are only limited in one respect: that they must hear both parties before making the award. Failure to comply with this duty may cause the award to be set aside, unless the parties have by consent agreed that this should not be a ground for setting aside the award (§ 1041, s. 4, *Z.P.O.*).[7]

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[1] *In re King and Duveen* [1913] 2 K.B. 32. Mr. Weiss writes in 43 *L.Q.R.*, p. 208: "There are few rules dealing with the procedure in an arbitration, but there is, on the other hand, a provision which may fairly be described as a dangerous pitfall. No award shall be enforceable if the arbitrators have disregarded some provision of the law which is *jus strictum* in the sense that the parties cannot provide anything to the contrary (1042, *Z.P.O.*, s. 2). So vague a clause must needs give rise to many doubts, particularly since it seems to compel the arbitrators not only to know the whole substantive law, but also to apply it where necessary, and to apply it correctly." It is clear that modern legislation cannot dispense with "vague" clauses, as Mr. Weiss puts it, or "Generale reservationen." Compare "misconduct" in s. 11 of the Arbitration Act or to act "fairly and properly." I am unable to follow Mr. Weiss's arguments here.

[2] *James* v. *James* [1889] 22 Q.B., p. 674.

[3] *Forwood* v. *Watney* [1880] 49 L.J.Q.B., 447.

[4] § 1033, s. 2, *Z.P.O.*

[5] *R.G.*, vol. 24, p. 397; vol. 47, p. 427.

[6] A reference to a constituted tribunal with fixed rules of procedure includes also these rules (Stein, *op. cit.*, vol. ii, p. 1035, n. 5).

[7] Mr. Weiss writes in 43 *L.Q.R.*, p. 208: The arbitrators "are not, however, bound to follow the ordinary rules of procedure or evidence, and are sometimes even precluded from applying them," and cites in support a decision of the *Reichsgericht*, vol. 31, p. 374. This decision has nothing to do with that question, as it only deals with the issue that, on an interlocutory injunction, if the court orders a plaintiff to bring an action within a certain time the plaintiff must proceed to arbitration within that time, if there is a submission, and the defendant does not lose his right to apply to have the proceedings stayed, if such an order is made. The arbitration tribunal is a court within the meaning of the order, although it would not be empowered to stop the injunction. This case deals, therefore, only with the position and powers of an arbitration tribunal in the system of German courts. There is no instance known to me where the arbitrator is not bound to follow the ordinary rules of procedure, unless it is a question of power. I am unable to follow Mr. Weiss's reasoning.

The arbitrators can examine witnesses, and expert witnesses, but they cannot examine them on oath or compel their appearance. This power can only be exercised by the court on application of a party (§§ 1035, 1036, *Z.P.O.*).

There is no statutory provision under German law as to the time when the award has to be made. But it is provided by § 1032, *Z.P.O.* that unreasonable delay on the side of an arbitrator not appointed by consent of the parties in the submission may be ground for an objection and removal, and unreasonable delay on the side of the arbitrator appointed by consent of the parties in the submission may revoke the submission.[1] In concluding this chapter, and in order to bring German arbitration proceedings within the statutory German rules under some English formula intelligible to English jurists we may define them as follows: They are arbitration proceedings mainly based upon confidence in two appointed arbitrators who have no power to appoint an umpire (exclusion of clause (*b*) of the First Schedule). The submission would expressly provide that no case or special case should be stated by the arbitrators, that the arbitrators should not be bound to decide according to law except the *jus cogens*, that the arbitrators should be absolutely free to make their own rules of procedure, except that they have to hear both parties, and that the parties would not apply for the removal of an arbitrator for misconduct except for personal disqualifications. In the following part of this article we shall consider the nature of the award in the two laws respectively, and how it is enforced, and shall then discuss questions of conflict of laws as to arbitrations.

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[1] Apart from these effects of an unreasonable delay, an action lies against an arbitrator who after having accepted refuses to act or rescinds the contract or delays unreasonably (*R.G.*, vol. 101, p. 392), but there is no specific performance (§ 888, III, 3, *Z.P.O.*). The position is the same under English law (Russell, *op. cit.*, p. 203).

(*To be concluded.*)

THE PROBLEM OF LEGAL INTERPRETATION IN FRANCE.

THE PROBLEM STATED, THE SOLUTION ADOPTED AND SOME ILLUSTRATIONS.[1]

[*Contributed by* PROFESSOR JULIEN BONNECASE, *Bordeaux*.]

THE present study is not intended to be a formal dissertation on the subject, but rather a summary description, such as may give to foreign readers as clear a view as is possible of the position taken up at the present time in regard to legal interpretation by French legal writers and by the courts.[2] The question is too complicated to be discussed in a few pages. My object is to give information, and I shall confine myself accordingly to stating the solutions which may be considered as accepted.

In order to form any judgment of the state of opinion upon the problem of legal interpretation and the manner in which it has been dealt with since the appearance of the Civil Code, it is indispensable to begin by distinguishing the works of those who are specialists in legal interpretation from those who are interpreters of the Civil Code, whether they be writers or judges. By specialists in legal interpretation I mean those authors who have written specifically on the subject of interpretation as distinguished from those who have had to practise interpretation incidentally and more or less empirically in commenting upon the Civil Code or on some other Code.

In this latter class there may be some who have attempted in their own minds to work out a theory of interpretation, but they have not attacked the problem in and for itself, and if they have a theory, they have revealed it only under the form of positive solutions of particular questions. Within this class fall those who are commonly called the great commentators on the *Code Napoléon* and also the judges. No doubt it is possible to find here and there a judicial decision in which a rule of interpretation is expressly laid down, but such cases are very rare. On the other hand, the commentators of the *Code Napoléon*, in the introductions to their respective works, have not failed to declare what rules they propose to follow in endeavouring to discover the true meaning of the Code. But their statements upon this head have been but brief, and far from amounting to a system or theory of interpretation. It is quite otherwise with the writings of those who have considered that legal interpretation in itself was a matter for scientific investigation and worthy to be the subject of a book even on an extensive scale.

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[1] Translated by the Editor.

[2] It is necessary to remind English readers that in France the *doctrine*, i.e. the theory adopted on a particular matter by writers of repute has a recognized weight even when it differs more or less from the *jurisprudence*, i.e. the view taken by the courts. (Note by Editor.)

Mailher de Chassat's Treatise.—These special treatises on interpretation were pretty few and far between in the nineteenth century in France. They do, however, occur now and then, and I want to make a few remarks about them because they are the result of tendencies of opinion which differ greatly from one another, and in some cases have nothing to do, properly speaking, with interpretation. This is a serious matter, because a foreign reader who wanted to have a correct understanding of the movement of ideas in France on an important subject like legal interpretation might easily be misled. The first book we meet with in this field is the *Traité de l'Interprétation des Lois*, published in 1823 by Mailher de Chassat. This little book had its hour of fame, and it still marks an epoch. I shall give some extracts from the Preface which are particularly significant. At the outset the author admits the difficulty of his task and endeavours to justify himself in undertaking it, while at the same time he lays down the limits of the field to be explored:

> I give a few rules as to the interpretation of statutes. I have hesitated more than once in the execution of my plan. . . . Some of my friends told me I was putting out on a boundless sea, and others pointed out the innumerable difficulties in laying down sound principles on this subject. For my own part, I could see many obstacles. Was not my title rather too ambitious? And, however modestly I might express myself, was I not going to have the air of giving lessons on a subject about which nobody wants any instruction? Has not everybody his own reason to guide him? And is not this torch a more certain help than the pale and trembling glimmerings from a book which calls everything in question? I did not allow these obstacles to stop me, but I should like to examine the one which seems to me the most serious. I am far from denying the difficulty which there is in laying down sound rules of interpretation. Nay, I will go further; I think that this important subject does not require a long explanation of principles. It belongs to metaphysics, and we know how in this branch of knowledge we often find side by side with the most sound proposition some proposition which is as subtle, and it may be, as dangerous as possible. But notwithstanding this, there are principles which are incontestable, being in accord with universal reason, which will always direct men of moderation and good faith. The sciences have suffered many revolutions; old methods of teaching have been superseded by new ones, but at the bottom the human mind works in the same way as it always has done, and, in spite of the immense discoveries of Bacon, Leibnitz, Descartes, Locke, Condillac, and their disciples, the philosophical works of Aristotle remain, even in our day, the collection which is the most complete, and, on the whole, the most sound of those truths which are useful and can be applied to the practical service of life. If we search the reason for this it is because Aristotle, whose mind was essentially just and straight, laid down his rules in accordance with the most natural and the most regular workings

of the human mind. Accordingly, I have yielded to the temptation to lay down a few principles upon the interpretation of statutes.

As to that individual reason, of which I spoke some time ago, who would venture to trust himself to such a guide ? It is very possible to write in good faith dissertations which may be elegant, precise and even specious, and yet they do not so much as skirt the subject in hand. In any science, wit and metaphysics may easily take the place of positive truth. In matters of legislation those truths which are permanent and useful support one another and are closely bound together. The man who is ignorant of the fundamental propositions of the science of legislation and of the consequences which clever people have been able to deduce from them in the past, and will be able to deduce in the future, runs a great risk of following his own idle imagination, and of wandering at large in a world of dreams.

But, someone may say, you have given us a great many quotations, and quotations just now are out of fashion, It is true, and for my part I confess that I have always considered it in bad taste to interlard one's remarks with a lot of quotations. Here the only excuse I shall offer is to repeat the observations I made some time ago. The net product of the science of law is a system of principles which have been laid down and accepted as true by the most able men occupied with that science. But the correctness of these principles is often only relative, and they may come into conflict with other principles which appear no less sound. On this account quotations, if made judiciously, may afford a sort of moral guarantee of the truth, the accuracy and the value of the rule we are laying down. The longer the series of men who have supported the same principles, and the further they go back the stronger will be this guarantee, and the more easy it will be to regard these earlier writers as authoritative. However, a selection has to be made, and here my task has been difficult. The science of law has not been conceived of in the same way or treated in the same manner at all the various periods of its history since the Renaissance in Europe. The subtle and scholastic methods of Cynus, Baldus, Bartolus and the other commentators of the thirteenth and fourteenth centuries were not those of Cujus, Doneau, Duaren, Hotman, Brisson, Merille, and the methods of these learned lawyers in their turn were not those of their successors. In our day the law schools in Germany appear to be trying to recover the elegant methods of our jurisconsults of the sixteenth century. But the German works in this field, whatever merits they may possess in other respects, are all stamped more or less consciously with the mark of one or other of those many philosophical systems which spread in that country with so much facility. Hence, the habitual tendency of their lawyers to generalize and to plunge, often quite needlessly, into abstruse and nebulous metaphysical speculations out of which the practitioner can very seldom extract any simple proposition of which he can make use. For the same reason the theories of German writers are so shifting and the writers are so often in conflict with one another, and even sometimes with themselves. Nevertheless, their works, executed as they are on a grand scale, and with much openness of mind, have been of great use to me. When I have got what I could from our legal writers who are the pride of France, I have borrowed with discretion from German jurists some principles which seem to me to be confirmed indirectly by our own authors, or to be generally admitted among us. Domat and Pothier are also among my authorities. These two great jurists, who represent, so to speak, the last epoch of the French law, have nothing in common with their predecessors. In their works we find no trace of that exquisite literary art and that profound knowledge of antiquity, always controlled by the most perfect good taste, which we find in such writers as Hotman, Doneau, Merille, etc. The works of Domat and Pothier are frequently expressed in the barbarous jargon prevalent in the seventeenth and eighteenth centuries. But, on the other hand, the method of these writers is excellent, their discussions are full of wisdom and honest thinking, and they lay down for us about every topic the only true principles to be followed. These two jurists, essentially friends of peace and of order in their own country, have the glory of having vulgarized, if we may say so, the science of law, and that without ever arousing any other emotion than the undying gratitude of France.

But Domat and Pothier themselves took as their guide the Roman law upon which their works were a commentary, and it is in fact in the Roman law that we find most clearly laid down those principles of eternal justice which are the most appropriate for human societies. This led Gui Coquille, champion though he was of the customary law, to say of the Romans *que, par don de Dieu, ils avaient la lumière de l'entendement bien nette, et le cœur bien franc.*

Accordingly, I have drawn habitually from that source. The Romans, however, did not well understand how to co-ordinate the different principles of law into one system. Nay, more, they never attempted to do this. What we get regularly in their books is the full discussion of a question, the scrupulous analysis of all its parts and the working out of the principles down to the most delicate distinctions, and even sometimes into subtleties. Out of this vast compilation I have selected, with the help of the most skilful commentators, the principles which seem to me to have most bearing on the interpretation of laws.

In conclusion, I have had to apply all this to the French law. How far I have succeeded I cannot say. All that I know is that my book is written in all sincerity and with the keenest desire that it should be useful. I considered that at a period when under a wise government the science of law had acquired a greater importance than ever before in our history, its study might be simplified by some rules of interpretation which were short and easy to grasp. As for the rest, the best of all the rules of interpretation and that without which all the others are useless, and are even liable to become dangerous instruments, is honesty, the freedom from all pernicious prejudice and a deep and sincere attachment to the good order, peace and prosperity of one's country. For us, this attachment is inseparable from that which we owe to the august dynasty which is the natural cause of the good order we enjoy, and without which our country would soon enter again upon a new era of misfortunes and crimes. Finally, we must never forget that for interpretation good faith is more important than knowledge.

It can hardly be doubted that a Preface like this, of which we have given the substance, is directly calculated to create confusion. We do not know exactly where we are. Fortunately, Mailher de Chassat, when he had followed up his Preface by an Introduction and came to state the problem of legal interpretation, was much more happily inspired :

The whole science of law may be divided into three great parts: (1) the didactical part; (2) the history; (3) the exegesis, or the science of interpretation. The didactical has two main objects: (i) the discovery and the explanation of all the parts of the positive law; (ii) the methods, general or special, adapted to facilitate their study. The historical part embraces everything that throws light on the causes, general or special, near or remote, of the different parts of the law; the changes, improvements, abrogations, derogations, and, in a word, all the vicissitudes of law. The history is divided into external history and internal history. The exegesis has for its object the interpretation of positive law. It is divided into two principal parts: (i) the philology of law, and (ii) the different methods of interpretation. Interpretation has for its aim to explain the sense of an obscure text, whether the obscurity arise from the insufficiency, the impropriety or the incorrectness of words, from some fault in reasoning or in phraseology, or from some defect in the characters employed, as when there is a clerical or typographical error. A system of rules adapted to the interpretation of law is called legal hermeneutics. The foundations of all interpretations of law are: (1) the signification, literal or figurative, of the words used; (2) the language used by the legislator, the structure of the law and the relation of the different propositions to one another; (3) the subject-matter of the law; and (4) the motive of the law in so far as throwing light upon the purpose of the legislator. Hence this incontestable axiom which will often be repeated in this treatise—the motive of the law is its soul and is, therefore, all the law. There are three kinds of interpretation: (1) doctrinal interpretation, *i.e.* by legal writers; (2) interpretation by usage or decided cases; (3) interpretation by the legislature itself, or authentic interpretation.

As regards usage this results from the manner in which the law is applied by all those officials whose duty it is to execute it. The usage is the result of the reason and intelligence which they display in so doing. As regards interpretation by the writers, two methods are recognized, the general and the special. When these methods fail to bring out the sense of the law the interpreter falls back on the established usage, such as a uniform and consistent series of decisions. When all these resources together are inadequate we must have recourse to the legislator who interprets the law by a declaratory enactment.

It is of course impossible here to examine in detail the book of Mailher de Chassat. He treats in succession of legal philology, of doctrinal interpretation, and of interpretation by usage and judicial decisions. We shall content ourselves with reproducing the last paragraph of the book, in which the author sums up his conclusions. The net result seems to be that legal interpretation means searching out the exact intention of the legislator:

I promised to point out the relations which exist between legal philology and interpretation by usage or by the legislator himself. In order to avoid an arid and metaphysical discussion about a matter as to which I intend merely to lay down certain positive rules I shall confine myself to the following remarks. The philological knowledge which I have required on the part of the ordinary interpreter of the law I shall require also without doubt on the part of one who is to interpret the law by usage or by decided cases, but this philological knowledge is not applied in the same way in these different cases. In doctrinal interpretation that which is of primary importance is to get at the exact knowledge of the intention of the legislator. Hence, all methods are good if they bring out the meaning of the text by external or internal evidence. In interpretation by usage, on the contrary, the most important point is to recognize that by a series of acts and documents suitable for creating an established usage, the law has been interpreted in a particular sense. The philological inquiries will then be directed to the critical examination of these acts, to weighing the evidence of every kind tending to show the existence of a usage and to examining all the essential circumstances enumerated earlier in order to see if there is here such a body of legal presumptions as to have the certainty of law in the eyes of the official whose business it is to apply the statute. In regard to a series of legal decisions appropriate to fix the sense of a law the business of the legal philologist is to study each case separately, to examine the precise facts upon which the judge proceeded, to consider the date at which the several decisions were given and the state of the law, statutory or jurisprudential, at these different dates and the manner in which these various decisions appear to agree with one another in giving a certain interpretation to the law in question. In a word, the philologist exercises here up to a certain point the functions of a legislator, for he declares that when upon similar facts we have a number of decisions in the same sense this sense shall be taken to be the settled meaning of the law, or, in other words, the intention of the legislator.

As to authentic interpretation philology plays here a much smaller part. The legislator who is concerned to explain his former intention seems to be under no further obligation than that of recovering this intention with accuracy in order to declare it fully. And although, from political or social considerations, he may sometimes depart from the precise limits of his original intention, nevertheless, seeing that the declaratory enactment is presumed to have been passed in the public interest, and seeing that the earlier law has not been expressly abrogated or modified, the presumption is that the legislator gives to the law which he interprets the meaning which he originally attached to it, and which ought always to have been given to it. It may happen, however, that the legislator interprets an old law of which he was not personally the author. In this case only he has to call in the aid of philology in the sense of doctrinal interpretation. For his first duty is to make sure of the intention of the original author of the law. But, seeing that in legislation the legislator is a moral person, composed of all the individuals exercising legislative functions, and seeing that they have succeeded one another with equal powers, the result is that the legislator who interprets an old law does so rather as a legislator than as an official applying the law.

Let us bear in mind this principle which Mailher de Chassat puts in the forefront, namely, that legal interpretation, in spite of everything, always comes back to this, that we must discover in the text of the law the real intention of the legislator. It matters little, after that, whether we are concerned with doctrinal interpretation or judicial interpretation, for, in either case the governing rule, according to Mailher de Chassat, is the same. We shall, however, see presently that in more recent times this so-called governing rule has been in France to a great extent thrown overboard.

Delisle's Work on Legal Interpretation.—After the book of Mailher de Chassat, the next special work on the subject is the *Traité de l'Interprétation Juridique*, published in 1849 in two volumes by Delisle, the Dean of the Faculty of Law of Caen. This book has a much wider scope than that of Mailher de Chassat, for its author at the outset discusses the nature of laws and the constituent principles of the French law. Nevertheless, Delisle is always coming back to the subject of interpretation, and we find his argument on this head condensed in the summary of chapter xvi: "On the rules to be followed for determining which of several possible meanings of a legal text is to be adopted." This is, in fact, the whole object of legal interpretation, to discover among several meanings that one which, on strict principles, ought to prevail. The rules proposed by Delisle are these:

> In the preceding chapters I have been mainly concerned to examine what are the different meanings of which a text is susceptible. (1) In certain cases one may correct the letter of a text by declaring that some expression has been omitted or has been incorrectly substituted for another. (2) One may give to certain expressions their natural and grammatical meaning, or one may take them in an unnatural sense. (3) One may understand certain expressions in a relative or in an absolute sense. (4) Sometimes expressions are to be taken in a wider and at other times in a more restricted sense. (5) One may add to the text by way of extensive interpretation, either by making it apply to cases which it does not cover if taken literally, or by deducing from the text consequences which are not stated therein. (6) One may by a restrictive interpretation refuse to apply a text to hypotheses to which it would extend if taken literally. (7) One may, looking at a genus which includes several sub-genera, declare by the argument *a contrario* that what the text says as to one of the sub-genera cannot apply to the others. (8) Frequently it happens that expressions, even taken in their grammatical sense, are susceptible of different meanings.
>
> I am going in this chapter to indicate the rules to be followed in order to determine which of several possible meanings of a text is the one which ought to be adopted. (*a*) The literal and grammatical sense of a text must be followed in preference to any other unless there are reasons for departing from it. (*b*) It is not permissible to restrict the text of a law so much as to make it ineffectual; secondly, it is not permissible to make distinctions without good reason; thirdly, if it results, from reading a text as a whole, that certain clauses in it are in conflict with the intention of the legislator, these clauses must be held *pro non scriptis*. (*c*) When there are several possible senses of a text that one is to be preferred which is most in accord with the rules of equity (*honestum et utile*). This was the view uniformly held by the Roman prætor. For, if the right to amend a statute was very properly taken away from the judges long before the publication of the *Corpus Juris*, nevertheless, they were always entitled and bound to choose among several senses of a law that one which was most in agreement with the interests of society in general, *i.e.* with the *honestum et utile*. (*d*) The expressions used in the text may be extended to hypotheses which were not contemplated by the legislator, if, by using general terms, the legislator indicated his inten-

tion to cover hypotheses even not known to him. But it is not permissible to make a text cover hypotheses which might be comprised in the generality of its terms if this can be done only by sacrificing equity. (*e*) If, in principle, we admit that when different interpretations are possible we should accept that which is most equitable or least inequitable, it may, nevertheless, happen that this affords no solution ; in that case we must fall back on usage. (*f*) In choosing between several meanings when the choice cannot be determined by considerations of equity, and when, moreover, there is no usage to settle the matter, we must have recourse to the *travaux préparatoires*, to the reasons for the measure which are there indicated, to the headnotes, to the circumstances in which the Bill was passed, to considerations based upon comparing different clauses with one another, to the presuppositions underlying some of the clauses, and even it may be to subsequent laws on the same subject, in a word to all indications which can throw light on the probable intention of the legislator. But nevertheless, we cannot as a result of these considerations adopt an interpretation which conflicts with the letter of the law.[1]

If I have quoted at length the rules as to legal interpretation formulated by Delisle, rules which the author supports by concrete illustrations taken from the Roman law and the Roman jurisprudence, I have done so because these rules embodied conceptions which had to wait till the beginning of the twentieth century to prevail with the legal writers. For we must not forget that, at the time when Delisle was trying his best to produce a kind of digest of legal interpretation, the Exegetical School, on the other hand, was engaged in building up a system of interpretation remarkably different from that of Delisle. It is true that they were doing this incidentally, so to speak, in the course of their commentaries on the Civil Code.[2]

The Exegetical School.—The representatives of this school refused to admit as a guide to interpretation anything at all but the intention of the legislator. They excluded altogether considerations of equity or ideas based on the theory of natural law.

I cannot do more here than refer to the citations from the authors given in my book. I will, however, recall the formula laid down in 1857 by Dean Aubry in an academic address which was a veritable profession of faith :

> Under colour of equity the positive texts and the most certain rules of law have been sacrificed to equivocal and indefinite considerations. Too frequently, especially in recent times, the limits of interpretation have been exceeded by impatient spirits whose concern was not so much to discover the

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[1] By *travaux préparatoires* French writers mean the discussion in the Chamber or in parliamentary committees on the Bill, the reports of parliamentary commissions, and so forth. As regards the Civil Code the term *travaux préparatoires* generally means the compilations of Locré and Fenet, which contain minutes of the discussions on the clauses. (Note by Editor.)

[2] See my book, *L'École de l'Exegèse en Droit Civil. Les Traits distinctifs de sa Doctrine et de ses Méthodes d'après la Profession de Foi de ses plus illustres Représentants*, 2nd. ed., 1924.

true meaning of the text as to make it mean what they wanted. The mission of professors of law, called upon to give legal instruction in the name of the State, is to protest, moderately no doubt but firmly, against any new doctrine which should tend to substitute another intention to that of the legislator. The professors of the *Code Napoléon* have in the past taken as their motto "all the law, the law in its spirit as well as in its letter, applying its principles in a liberal manner and developing as fully as possible the consequences which follow logically from the text, but at the same time nothing but the law."

No doubt, but the question still remains what did the leaders of the Exegetical School mean by "the intention of the legislator"? It is pretty clear that they mean, in the first place, the real intention, but, failing the possibility of discovering this, they fall back on the presumed intention. And when we have got to that point there is no longer any limit to individual fancy. Some of them found this presumed intention in a train of decisions in the same sense. Others found it in the history of the subject, others in the *travaux préparatoires*, and others again by reasoning by way of analogy. In short, the Exegetical School, so far as legal interpretation is concerned, sank into pure romanticism. For this school there did not exist any system of legal interpretation properly so-called. Nay, more, this want of any such system affected their theory of the law in itself, for the excellent reason that the Exegetical School identified law with legislation and refused to admit any source of law except legislation. I cannot here insist upon this point, but must content myself with referring again to my book *l'École de L'Exegèse*. I may note at the same time that during that period of our legal history the judges and the legal writers carried on their work, subject to certain exceptions, in separate watertight compartments. Both the judges and the legal writers, or, as we say, *la jurisprudence et la doctrine*, practised the interpretation of the Code, each on their own account, *i.e.* the judges troubled themselves very little about what the writers said, and the writers were equally indifferent to the decisions of the courts. That this was the case will appear more clearly later on when I draw attention by the aid of some illustrations to the work that the courts were achieving. But before doing so, it is indispensable to point out that under the influence of such writers as Bufnoir, Saleilles and Labbé the legal interpretation of the Exegetical School became still more elastic because the text of the law was no longer to be considered by itself but in connexion with the facts. In other words, according to these writers, legal interpretation ought to be dominated by the double law of accommodating the facts of life to the texts and of adapting the texts to make them fit the facts of life and the social *milieu*.[1]

This was the stage which had been reached when there appeared the ever-memorable work of Professor Geny, which revolutionized the science of private law in France.[2]

[1] Cf. Bonnecase, J., *L'École de l'Exegèse*, pp. 41 *seq.*

[2] *Méthode d'Interprétation et Sources en Droit privé positif, et ses Critiques*, 1899, 2nd ed., 2 vols., 1919.

The Work of Professor Geny.—It must, however, be noted at the outset that, in spite of its principal title, M. Geny's book was concerned less with the rules of interpretation properly speaking, than with the actual sources of rules of law. This book, in other words, took up the opposite position to that of the Exegetical School in so far as it maintains that legislation could never be more than a formal source of law, or, if we prefer to put it in that way, legislation was a positive expression of the law. Doubtless, M. Geny found himself obliged to give rules of interpretation, but we should misconceive the scope of his book if we were to treat it as being mainly a work on interpretation. Nothing shows this better than the way in which, in his Introduction, he states the problem which he proposes to solve:

> The whole mission of jurisprudence in the positive order consists in disengaging and in applying to the relations created by the state of society, and that with the sanctions ensured by the force of society, such rules as are fitted by satisfying our innate sense of justice to maintain among the various interests and with the necessary security the harmony desirable in conformity with the end assigned by God to humanity. But how are these rules to be discovered and be applied ? Here begins the rôle of Method in the widest sense of that term. We are not absolutely free in the determination of the elements of this method. The judges, who in primitive times were left free to their individual interpretation, spontaneous and changing as it might be, with no guide except Custom, found themselves later restrained by checks and limitations of which they were the first to feel the necessity and to appreciate the benefit. The social authority, in conformity with its rôle as director and acting by virtue of its sovereignty, began to pass *laws*, *i.e.* rules legally obligatory, at first rare and timid, but afterwards more frequent, more decided and more complete. This phenomenon of *legislation*, which is ancient and universal though not socially indispensable, passed through phases which differed widely according to the country and the period. So far as concerns our modern French civilization it reached its culmination in a codification which covered almost the whole field, a vast piece of general legislation carried through almost *en bloc* at a propitious moment with wonderful promptitude and sureness of touch, thanks to the genius of the race, and to the work of centuries before. This is the point at which we are now, and it is to this situation that our legal processes have to accommodate themselves. . . . This being the case, has our legal science known how to discover and to make use of the most appropriate ways and means for realizing this end ? Have we known how to interpret, not only the statute but the law immanent in the statute of which it is after all but the imperfect revelation ? Have we comprehended as we ought, without either minimizing or exaggerating its importance, the full effect of this startling social phenomenon of codification ? Under the pretence of getting to the bottom of the thought of the legislator have we not changed its nature ? By putting arbitrary limitations on the field of investigation or by diminishing the importance of the rôle of the interpreter, whether he be a judge or a legal writer, have we not exaggerated the mission and the power of the legislator ? Have we not too often also been led away by the seduction of a deceptive logic into forgetting the realities

and the necessities of life? It may appear bold to raise questions like this when our traditional system of interpretation is firmly established on principles accepted by all those who employ it, judges, practising lawyers and impartial writers, and when, as a result of this agreement, so many theories seem to have been fully elaborated and so many solutions have been reached, which have enriched the practice and influenced the trend of legal life in its details no less than in the mass. . . . However, if we are convinced that jurisprudence, like every other branch of science, is subject to the law of progress, it is necessary that we should have constantly available an instrument for the elaboration of the law, apart from legislation strictly so-called, which manifestly cannot be trusted to keep pace with the ceaseless evolution of legal needs. Failing any constitutional organ specially adapted for this purpose (as was the edict of the Roman prætor) this instrument must be within the reach of the judge as well as of the theoretical lawyer. It is equally necessary for the solution of practical questions and for the fruitful systematization of judicial decisions. In our French civilization this instrument can only be a *Method*, broad and subtle at the same time, of which science alone can define the processes and fix the rules. The method in itself assuredly does not need to be created. It exists, it works, it has justified its existence. But it is our right, and in a certain measure our duty, to investigate its foundations, to appreciate its actual working and to seek to perfect it. And what ought to encourage us in thinking that something really serious may be achieved in this direction is that in recent times a marked reaction is observable against the excesses of the traditional processes of interpretation. We see signs of this reaction pretty generally among jurists of different nationalities, some of whom are more conscious of it than others, and it has even led to startling professions of faith on the part of some distinguished persons.

After having sketched in this way the movement of ideas on this subject both in France and abroad, M. Geny thus describes the immediate object which he has in view:

I have sufficiently indicated, I think, in the foregoing remarks that I take up my stand on the field of the interpretation of pure positive law, the domain of the practitioner, of the judge and of the legal writer, of all those, in short, whose business it is to find the appropriate solution which can be applied, not ideally or as matter of pure reason, but concretely and in fact, to the questions which are raised by conflicting human interests. We have to examine the method of investigation open to them, *i.e.* to distinguish the processes of research and of study which are the best suited to their peculiar task or applying the positive law. And, in order to keep strictly to the practical standpoint, I propose this question of method entirely with reference to the situation as it is created for us by the French legislation actually in force. I am prepared to state at the outset that under a system different from our codification, as it exists, the methods of interpretation might be widely different even in some essential respects. On the other hand, in order to keep the inquiry within strictly defined limits, I propose to examine legal interpretation only so far as applied to private law, and, more particularly, to civil law. Analogous questions arise no doubt in other branches of this science, such as criminal law, administrative law and civil or commercial procedure, but in these I can see that the method may be influenced by the subject-matter. In the case of criminal law this is quite obviously so. For the sake of precision, then, I prefer to confine my criticism to that part of the law which is most general, and most typical. Within these limits I propose, first, to state briefly the method of legal interpretation which is usually taught and is, so to say, officially practised with us. The mere description and analysis of this method will enable me to demonstrate its defects and shortcomings, not to say its fundamental and unpardonable vices. I shall then inquire what can be done to extend it and to make it more supple, either by modifying the foundations, rational or legal, on which it rests, or by enlarging its scope by borrowing principles from allied sciences. The conclusion will then be clearly indicated, and all that will then remain for me to do will be to point out very shortly the practical means by which the method which has just been rejuvenated may be made as fertile as possible.

It is not possible here to analyse Geny's book so far as it deals with interpretation. I must refer for that matter to my recent work on the subject.[1]

Present State of the Law in France.—Here I shall content myself with reproducing certain propositions laid down in that book (nos. 73 *seq.*) which appear to me to sum up correctly the present state of the law in France in regard to legal interpretation. These propositions are as follows: (1) We must reject absolutely the principle laid down in the classical doctrine of interpretation that a statute is capable of indefinite extension and that the function of the judge in each particular case is limited to discovering the meaning of the statute. This proposition needs no defence. Nobody maintains now that the legislator has an unlimited power of prevision. No legislator has ever foreseen everything, nor is it possible that he could do so. (2) We must reject absolutely the principle of the historical school which attributes to legislative texts meanings which vary at different periods and makes the mission of the courts to fix at the particular date of the case in hand what is the effect of the statute, having regard to the state of society at the time. The historical method of interpretation leads, in fact, to the most complete arbitrariness. Under cover of interpreting a legislative text the judge can give free rein to his fancy. (3) Every statute has a scope which is essentially limited and objective. To discover this scope we must have regard on the one hand to the literal terms of the statute, and, on the other hand, to the social end (*but social*) in view when the statute was made. I shall give some concrete illustrations, taken from decisions concerning the dotal system, of the application of this proposition. This third proposition is for me the fundamental proposition upon which the French system of interpretation at the present time is based, or, to put it another way, it is this conception of the relations between the legislator and the judge which has carried the day. Let us break up the proposition in order better to grasp its practical bearing, and then give some illustrations. I say at the outset that every statute has a scope which is essentially limited and objective—a scope determined by the formula employed, and by the social end aimed at. Its scope is limited, in the first place, because every statute, however general may be its language, is intended to affect only a determinate category of interests. In the second place, its scope is objective, because, once the statute has passed from the hands of the legislator, it is a document which produces by itself effects to be determined by consideration of the two elements, viz. the language of the text, and the social end which rendered the statute necessary. In other words, every statute is a disposition, more or less imperative, materialized in a text for the purpose of realizing within a determinate sphere that social harmony which is the supreme object of the law. The text and the social end are, accordingly, the two factors to take into consideration in the interpretation of a statute. The first element is fixed; it consists of a formula, the literal meaning of which is furnished to the interpreter by the technical language of the law, unless indeed he has to declare the work of the legislator inoperative. Taken in itself, it would seem that this element must, of necessity, immobilize the positive law in a strictly legal interpretation, and must take from it all elasticity. Fortunately, this is not so. All that it comes to is that we have an abstract form of words meant to give effect to a social end, and as this social end is a mobile element the lawyer will be led infallibly to the various different and successive applications of which the formula is susceptible. In this way the statute attains the maximum of suppleness, and the interpreter on his side is sure not to denaturalize it or to exceed the just limits if he takes care—and this is relatively easy—to assure himself that each one of his solutions corresponds strictly to the social end which is hidden under the legal formula. In a word, all arbitrariness on the part of the interpreter is excluded. If the text, considered in the light of these two tangible elements which we have described, does not give him the solution for which he is seeking, all that is left for him is to resign himself to fall back on other sources of positive law, unless he is prepared to stay the course of legal evolution, or to turn it in another direction, and thus to interfere with that social progress of which legal evolution is at the same time an aspect and a condition.

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[1] *Précis de Pratique Judiciaire et extrajudiciare. Élements de Clinique juridique plus spécialment à l'Usage des Aspirants au Barreau, à la Magistrature et au Notariat,* 1927.

Decisions of the French Courts.—When we review the body of decisions of the French courts, we find that with regard, at any rate, to certain matters the courts have applied this formula admirably. I will give one particularly characteristic example in regard to the dotal system. If we look at the texts of the Civil Code, and more particularly if we refer to the *travaux préparatoires*, it is clear that the legislator, when the *Code Napoléon* became law, intended to make inalienable only such immoveables as formed the whole or part of a *dot*. But the courts have extended this inalienability to *moveables* also which form the whole or part of a *dot*. And they have done so in spite of the protests raised persistently for a long time by the *doctrine*, which was at that time governed by the precepts of the exegetical school in making the intention of the legislator predominate. The courts, on the other hand, were concerned about the social end which the legislator had in view in giving legislative consecration to the dotal system, and they declared that there was just as much reason for protecting a moveable *dot* as an immoveable *dot*. Nay, they even went further by creating the theory of total securities included in the paraphernal property.[1] In other words, the courts held that in certain circumstances paraphernal property included some items which were dotal, and that these dotal items must be protected by being made inalienable just as much as the immoveable *dot* or as a moveable *dot* created in express terms. (4) Legal interpretation based on the two elements, the formula of the text and the social end, is governed by the same principles (subject to one special consideration which will be noticed later) whether the text to be interpreted forms part of a code or is a statute by itself.

This proposition lays down the principle of technical uniformity in interpretation, whatever may be the character of the text to be interpreted, but, on the other hand, it takes account of one special consideration which applies when we are interpreting several articles of a code. Rightly or wrongly, every codification is considered as embodying a general conception, and, as in consequence, using in its different parts the same technical words in the same signification. It follows that a special duty lies on one who is called upon to interpret the text which lays down one of these general notions. He must not be satisfied with taking the text by itself, he must read it in connexion with the other texts dealing with the same matter in order to obtain a consistent interpretation. If he does not do this he will do violence both to the spirit and to the letter of the Code. The theory of "an act of administration" is an illustration of this. There are very numerous texts in the Civil Code which refer in various connexions to "acts of administration." By comparing these texts with one another it is possible to arrive at an objective notion of an "act of administration," a notion which can, I think, be formulated in this way. An act of administration is a juridical act concerning a specific piece of property or a family estate considered in its concrete elements, which is directed either to the investment or exploitation of the capital sum (which is by definition essentially stable) or to the appropriation or the utilization of the income accruing from this capital without compromising in any way the existence, the individuality or the amount of the said capital.

In like manner, it is by comparing together a number of articles in the Civil Code that we have arrived at the notions of juridical act, contractual responsibility, delictual responsibility, enrichment without legal cause, fortuitous event and *force majeure*.

[1] All the property of a woman married under the dotal system is paraphernal, except that which has been constituted a *dot* (C.C. 1574).

Conclusion.—I might lay down further propositions, but I think I have said all that is essential to explain how the problem of legal interpretation presents itself in France at the present time, and the manner in which the problem is solved. I will conclude by making two remarks of a supplementary character. The first is this: When the judge cannot find the solution of the difficulty presented to him by reference to custom, or to the decisions of the courts, or in the text of the code, interpreted according to its literal terms and the social end aimed at, he is condemned in that case to go outside the field of legal interpretation in its strict sense, and to enter the domain of direct elaboration of positive law. But, nevertheless—and this is my second remark—the judge must from that moment be on his guard against falling into legal romanticism, that is to say, against letting his individual fancy run away with him. He must apply to the facts general principles of law, and he must remember at the same time that when he is dealing with codified law he must submit to the influence of the general spirit of the codification. In other words, the rational element and the experimental element must play their parts in combination. It is in this way that in France the courts have built up, for example, the theories of enrichment without legal cause and *abus des droits.*

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Constitution of Ceylon.—Lord Passfield's despatch of October 10, 1929,[1] cannot be said very materially to solve the most important difficulty regarding the Constitution of Ceylon, the question of responsible government. The difficulty in regard to the Constitution is the fact that what has been proposed by the Special Commission, and endorsed by the Secretary of State, is virtually responsible government in all essentials, but without the normal machinery of responsible ministers, whose place would virtually be taken by Executive Committees with chairmen as ministers. Lord Passfield has not added anything to the considerations which induced the Commission to refrain from recommending the grant of responsible government,[2] though he alludes to the fact that there is no immediate prospect of the appearance of a party system, but there is the danger of the formation of groups based on religious or racial differences. The committee system, it appears to be held, will secure due regard to minority views while not preventing majorities having due weight. It is conceivable that this may be the case, but it is fair to point out that the growth of parties in the Dominions was posterior to responsible government, and that there is no special reason to suppose that experience in Ceylon would be otherwise than in the rest of the Empire. Moreover, the system proposed is, apparently, very much like the system on which, *de facto*, as opposed to *de iure*, the government had been conducted under the existing Constitution, a system which the Commission rather inconsistently condemned. It appears, moreover, to have the fundamental fault of minimizing real responsibility and substituting the confused result of committee government. In any case, it is clear that the Governor is not to have any greater influence over the Committees than he would be given if there were ministers as normally. His intervention is regularly to be confined to defence, external affairs, the interests of British subjects outside the island, and the rights of the public service. Lord Passfield emphasizes the fact that the Governor's additional powers are to be a matter of reassurance and precaution only, and on this basis he is willing to allow him to secure the passage of a vote or resolution by his own declaration of paramount importance, reporting immediately to the Secretary of State. The divergence between normal and this modified responsible government seems minimal, and to indicate that the usual type must ere long be frankly conceded, rendering the effort to interpose a half-way house rather doubtful.

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[1] Parliamentary Paper, Cmd. 3419.

[2] See *Journal of Comparative Legislation*, Third Series, vol. xi, pt. i, p. 114.

The Franchise.—It is not surprising that Lord Passfield has agreed with the views of the Legislative Council that there is nothing to be gained, in conceding female suffrage, in delaying its grant by an age restriction. The enormous expansion of the electorate already decided upon renders the grant at the age of twenty-one to women of minor importance. Much more interesting is the decision on the franchise residential qualification. The position of Indian immigrants will properly be determined by the rule demanding five years' residence, plus a certificate from a government officer as to the claimant's intention of permanent settlement ; in case of refusal of a certificate, appeal will lie to the Governor personally as a simple and cheap means of preventing injustice. This gives the vote to all those Indians who are properly entitled, as having a permanent settlement and interest in the island. Indian voters will be expected to agree to renounce any privileges as immigrants, a sacrifice merely nominal, but perfectly proper. The Governor's recommendation that the literacy test, suggested by a narrow majority in the Legislative Council, should not be imposed, is very wisely accepted by Lord Passfield. It is perfectly clear that it would be impossible to work the test fairly without ridiculous cost ; that it would exclude many deserving voters, especially among the Kandyans and the labouring classes ; and that it would merely present a constant source of friction until it was removed as unwise.

The Dominions and the Optional Clause.—The standing question of the relations *inter se* of the Dominions and the United Kingdom was deliberately and rather needlessly raised by the Irish Free State in respect of the signature of the optional clause of the Statute of the Permanent Court of International Justice providing for compulsory jurisdiction in certain cases. While the rest of the Empire agreed on a common form, involving acceptance for ten years only, subject to far-reaching conditions, the Irish Free State accepted the clause a week earlier, for twenty years, and without reserves. The motive, unquestionably, of this action was to establish the independence of the Free State within the League, but after all that freedom had not been denied in essentials, and it was negatived by the action of the other Dominions and the United Kingdom as regards the one point of importance to the State, the desire to have relations with the United Kingdom put on the basis of international law. The acceptance by the rest of the Empire excluded " disputes with any other member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such matters as the parties have agreed or shall agree." The doctrine that disputes between members of the Empire are not within the province of the court as a matter of international law was, however, apparently opposed by the Union of South Africa, which agreed to the actual reservation on the score of expediency. But it is satisfactory that no change had taken place in the views of the British Government. The reservations made in other respects are innocuous; they exclude disputes which it is agreed to settle otherwise than through the court, and disputes with regard to questions which by international law fall exclusively within domestic jurisdiction,[1] while the right is reserved to secure a suspension of the proceedings of the court for a period not exceeding normally twelve months by reference of the issue to the Council of the League for consideration. This period may be extended by agreement of the parties, or by a decision of all the members of the Council other than the parties in dispute. Of much greater importance is the restriction of acceptance to disputes arising after the ratification of the declaration with regard to situations or facts subsequent to the ratification. This terminology is intended to exclude any reference to the court of the issue of the exercise of war rights during the war of 1914–18, and not, of course, as has been suggested, to exclude any of the classes of questions enumerated in art. 36 of the Statute.

The Status of the Union of South Africa.—General Hertzog has been placed in the rather interesting position of being compelled to take up an attitude of distinct opposition to several suggestions emanating from the Nationalists in favour of emphasizing the international status of the Union. He had shown no enthusiasm for the proposal made in the Orange Free State that the next incumbent of the office of Governor-General should not be sent from England, recognizing very wisely that to appoint any South African would be to put a partisan in an office where absolute freedom from partiality or suspicions of partiality—which is perhaps as bad—is essential. He successfully secured the dropping of a proposal to reaffirm the demand for independence which some Nationalists were unkind enough to press, giving, as the Prime Minister pointed out, just cause of resentment to the British element of the population. Further, he declined to commit himself to pressing for the abolition of the right of appeal to the Privy Council; and, last but not least, he would not consent to accept the specious argument of a part of his following that, since the Union is a sovereign independent State, it is not bound by the terms of the Constitution and it is at liberty to disregard the requirement of the Constitution that a change in the Cape native franchise can be carried only by a two-thirds majority of the two houses in joint session. The last argument is quite a specious one, for it raises once more the fundamental question recently pressed by the leader of the opposition in Canada, that a State whose Constitution rests on an Imperial Act is not in the full sense independent and sovereign. On the other hand, the determination to create freely representatives of the Union in foreign countries and the suggestion that the representative of the Union in London should be transformed into a diplomatic agent, with full diplomatic position and privileges, though supported by Mr. Louw before leaving for his post as

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[1] Presumably of each territory in the Empire.

Minister at Washington, indicate the feeling that it is essential to insist at every turn on the distinct personality of the Union, and to seek to convert its relations to the United Kingdom into those of international law. It may be doubted whether the latter project is wise, and Lord Passfield has certainly given it no encouragement; immunity of the representatives of the Dominions from suit could be secured without so radical a transformation of their status, and could be accompanied by similar treatment of the British High Commissioners or representatives in the Dominions who at present are without diplomatic privileges.

The Irish Free State and the Privy Council.—It may frankly be regretted that the Irish Free State has so openly and determinedly adopted the attitude announced by Mr. Blythe, that the Parliament will legislate to undo any results which may be obtained by a litigant through appeal to the Privy Council from decisions of the Supreme Court of the Free State.[1] The attitude adopted by the British Government, namely, that it can take no action unless it is formally approached by the Free State Government is, perhaps, the only convenient position; but it is in no wise heroic, and even a little absurd. The refusal of the Free State to recognize the appeal is clearly, as Lord Reading has stated, a breach of the treaty and of the Constitution, in which the appeal was expressly inserted at the demand of the Imperial Government, in order to give effect to the obligations imposed by the treaty, and, while it would have been wiser of the British Government in 1926 to surrender by law the appeal, there is no doubt that the Irish attitude is a repudiation of a clear legal and moral obligation. It must be added that it would have been most unfortunate if the attempt to rule out questions on such matters in the Commons had succeeded. If the relations between the Dominions and the United Kingdom are to be regulated by formal agreements, as is now the fashion, then the extent to which an agreement is carried out by either side is a legitimate matter for inquiry in the Parliament of the other, and in the Dominion Parliaments, of course, no convention has ever been established secluding from discussion the attitude of the British Government on any topic. It might indeed have been suggested with equal justification that no question could have been raised in the Commons on the desire of the Australian Government to depart in a very important particular from the agreement under which the £34,000,000 immigration loan was arranged with the Commonwealth. It is naturally unfortunate that the Commonwealth request, which had to be conceded, for a serious interference with immigration should coincide with the increase of the tariff in order further to shut out British manufactures from Australia.

The Commonwealth Elections.—The singularly complete defeat of Mr. Bruce's appeal in October to the electorate over the issue of the abolition of the system of compulsory settlement of industrial disputes through the agency of the Commonwealth Court of Conciliation and

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[1] See *Journal of Comparative Legislation*, Third Series, vol. xi, pt. iv, p. 257.

Arbitration has served as a revelation even to Australian opinion of the hold on the public imagination of a system which has been freely condemned by experts, as tending to hinder the Commonwealth in its difficult task of industrial development. The argument used by Mr. Bruce that the present system, with its conflict of State and Commonwealth jurisdiction, was an intolerable nuisance certainly seemed to have weight, and the present problem would seem to be whether there is any chance of the States now agreeing to do what they refused to accept when asked by Mr. Bruce, and abolishing their machinery for arbitration and fixing of wages and conditions by determinations of wage boards or legislation. The legal confusion, however, seems to appeal less to those accustomed to the system than to outsiders, and it is clear that there is a strong feeling both in the States and in the Commonwealth that both the local and the central systems of control have useful parts to play. The preponderance of the present opposition in the Senate revives the possibility of the attempt made quite fruitlessly in 1914 by the government of the day[1] to secure a majority in the Senate by the operation of a double dissolution, which can be obtained under the Constitution if the upper house persists in negating a measure duly sent up from the lower house. It is clear that, if the Government decides on this course of action, and if the Senates challenge it, it will rest with the Government to decide if there is to be a dissolution. The framers of the Constitution thought of the Governor-General having some measure of independence on this point, but the decision of the Conference of 1926 has clearly removed any possibility of this. The change resulting from that Conference was seen clearly in the procedure as to the dissolution asked for by Mr. Bruce on his defeat; under the old practice the Governor-General would have been entitled to see whether a coalition of Labour and dissident Nationalists might not have been willing to carry on until the normal close of the session. As it was, in accordance, as Mr. Bruce explained, with the rules of 1926, the decision to dissolve was arrived at on Mr. Bruce's advice without effort to secure another administration. The new position is clearly more comfortable for the Governor-General, and it has elicited an unique expression of determination on the part of the electorate, converting a minority of nine into a majority of fifteen in the lower house, while the Nationalists lost their leader and are bitterly divided through the circumstances of their downfall.

Relations with Russia.—It is unfortunate that the Imperial Government had to act alone in the matter of resuming formal relations with the U.S.S.R. The issue involved was one affecting the whole of the Empire, for it is obviously undesirable that certain parts of the Empire should be in relations of cordiality with a foreign power, while other parts decline to accept that position. It is made clear by Mr. Bruce's statement, in the House of Representatives of the Commonwealth on August 29, that it was agreed between the Governments that the British procedure would be to obtain a settlement of outstanding questions before resuming diplomatic relations. The change of British policy necessarily rendered it difficult for the Empire to proceed as a unit, but some of the inconvenience arising from this procedure is obviated by the adoption of clause 7 of the protocol of October 3,[1] under which on the exchange of Ambassadors there is renewed the assurance as to propaganda given in art. 16 of the abortive treaty of August 8, 1924, between Great Britain and Northern Ireland and the U.S.S.R., for the obligation imposed on the latter applied to propaganda in the whole of the British Empire, not excluding the Dominions. The result of this mode of procedure is curious ; the obligation undertaken by the U.S.S.R. is one towards the United Kingdom, and not towards the Dominions, and it would appear impossible to claim that under it the Dominions as such would have any right to demand the advantages of the undertaking, except in so far as the United Kingdom cared to take the matter up. The protocol illustrates thus the advantages which can be secured for the whole Empire, without the intervention of representatives of those Dominions, by reason of the power of the Imperial Government still to stipulate for advantages to the Dominions even when they are not parties to the stipulation which is concluded without their antecedent concurrence.[2] In precisely the same way the whole body of British subjects has been assured the benefits of the understanding reached with France[3] as to the application to residence, no less than to commerce and navigation, of the most-favoured-nation clause of the convention of February 28, 1882. Dominion British subjects thus, without the intervention of their governments, are assured of all the advantages of the French legislation of 1926 and 1927 regarding the relations of landlord and tenants. On the other hand, the agreement with France of August 2, 1929, as to damage suffered in war in the United Kingdom and the Irish Free State, on the one hand, and France, on the other, confines the benefits to British nationals of these territories—a most vague expression, on which it would be impossible to place any really definite sense. It was impossible for the Free State to insist on mentioning Irish citizens without excluding other residents. The agreement is very unfortunately concluded in the names of the governments, a practice disapproved by the Imperial Conference of 1926, but preferred by the Free State as ignoring the name of the King.

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[1] See Keith, *Imperial Unity and the Dominions*, pp. 106–12.

The Ratification of Treaties.—A decidedly interesting discussion was raised in the Dominion House of Commons on the issues of the ratification of the Convention of January 1929 regarding the preservation of Niagara Falls concluded with the United States. The Government, adopting its recent mode of procedure, asked the approval of Parliament for the treaty, but did not proceed by means of a Bill. The result was to elicit from Messrs. Bennett and Cahan a clear exposition of the position of Canada as regards treaty ratification and legislation. Two quite different things must be distinguished: treaties which can be carried through without alteration of the law of the land, and treaties which, like the one in question, might necessitate legislation because they interfered with private or public rights of a province, over which the Dominion had legislative power merely under s. 132 of the British North America Act, 1867. In the former case simple approval by Parliament would be sufficient, justifying the government of the day in asking the King through his Privy Council at Westminster to ratify the treaty; the insistence on the fact that the King cannot act directly on Canadian advice is noteworthy, though a commonplace. Secondly, if the law must be changed, then an Act of Parliament should be passed before the treaty was ratified. The Prime Minister held that the issue was narrowed down into the question whether the approval of ratification and legislation, when necessary, need be simultaneous, and he held that there was no necessity for simultaneity. There seems, however, to be a further point of substance in the matter. It may well be argued that the approval of ratification is necessary in the first instance, because, until ratification, the treaty does not become binding, and is not, therefore, an obligation which Canada has power under the Act of 1867 to carry into force by legislation. The point is technical, and might be evaded by enacting that the law would take effect when the treaty had been ratified, but, as matter of form, it was open to the Prime Minister to contend that the right to legislate arose only after ratification, and that accordingly the practice of proceeding in two stages, first by resolution, which does not involve any legislative action, and then, after ratification, by Act of Parliament, was the sound one. It was recognized in the debate that in any amendment of the Constitution provision must be made to reconsider s. 132 which, as it stands, is ill adapted to modern use and which might be used to prejudice provincial rights unduly through the invasion of provincial spheres by the conclusion of treaties.[1]

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[1] Parliamentary Paper, Cmd. 3418.

[2] It must, however, be noted that the terms of the notes exchanged between the British and Russian governments on December 20, 1929, are ambiguous, and that it is possible to interpret the Russian attitude as contemplating further separate agreements with the Dominions before propaganda in them will be excluded. But the British Government has again acted for the Dominions in the notes of December 20–24, 1929, on the gradual abolition of extra-territorial jurisdiction in China.

[3] Parliamentary Paper, Cmd. 3404.

The Rights of the Civil Service in Pension Matters.—It is rather surprising that it should have been deemed worth while by the civil servants concerned to endeavour to prove to a court that the Treasury has no power to determine the amount of the superannuation allowances of the civil service.[2] The question raised was based on the well-known Treasury minute of March 20, 1922, which determined the proportion of bonus to be included in calculations of the superannuation allowances due to civil servants, and the court was asked to rule that the minute was *ultra vires*, and that the Treasury must grant pensions, based on the view that the whole amount of the bonus must be reckoned for pension purposes. It may be observed that such a claim is without any serious moral ground, for there was never any understanding in the service that bonus payments should be treated as ordinary payments for pension purposes; if there had been, the bonuses would undoubtedly have been reduced to prevent an unfair burden on the State. The bringing of the action was doubtless suggested by the success of Irish civil servants in establishing a claim to more favourable treatment than that contained in the minute. But that success was conditioned entirely by the existence of the Anglo-Irish treaty of 1921, and its statutory affirmation, which changed radically the whole aspect of the rights of the civil servants and gave them a legal basis. The claimants had to seek to undermine the authority of the direct decisions in *Cooper* v. *The Queen*[1] by Malins V.C. and *Yorke* v. *The King*[2] by Lush J., despite the fact that in *Considine* v. *McInerney*[3] Lord Buckmaster and in *Wigg* v. *Attorney-General for the Irish Free State*[4] Lord Cave expressed their opinion that the decisions in these cases expressed the rule of law. Clauson J. naturally held that he was bound to hold that the claim of a civil servant to pension was not a legal right enforceable in the courts. He refused also to accept the view that, even if there were no legal right, a declaration could be made stating the true construction of the Superannuation Acts of 1859 and 1909; if there were no legal right, the basis of jurisdiction to grant a declaration was necessarily cut away. Nor was it possible to accept the ingenious argument that, though the Acts conferred no legal right, one could be derived from the fact that the claimants entered the service in the knowledge of a small pamphlet in which the Acts and the Treasury minute were duly set out. Clauson J. ruled that the document in question did not purport to create a contract, and added that there was no authority vested in the Treasury to conclude any such contract. He furthered negatived efforts to prove that as regards one claimant, the Telephone Transfer Act, 1911, and as regards another the Metropolitan Police Acts, had taken away the power of the Treasury in respect of determining pensions. It may be added that, as the Solicitor-General pointed out, the form of action against the Attorney-General was clearly invalid, and a petition of right should have been resorted to.

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[1] See *Journal of Comparative Legislation*, Third Series, vol. xi, pt. i, pp. 121–4.

[2] *Nixon and Others* v. *Attorney-General*, 46 T.L.R. 31.

Female Senators in Canada.—A certain degree of doubt must exist as to the wisdom of the Privy Council in entertaining an appeal from the unanimous judgment of the Supreme Court of the Dominion on the issue of the power of the Governor-General to summon women to be members of the Canadian Senate.[5] The value of the appeal to Canada lies essentially in the fact that issues between the provinces and the Dominion can thus be disposed of by a tribunal which cannot be suspected of any bias

[1] 14 Ch. D. 311.

[2] [1915] 1 K.B. 852.

[3] [1916] 2 A.C. 162.

[4] [1927] A.C. 674.

[5] *Edwards and Others* v. *Attorney-General for Canada*, 46 T.L.R. 4.

in favour of the Dominion, as its judges do not owe their places to the Dominion Government. It is a different matter to accept appeals on issues which concern the Dominion alone and, moreover, on so intimate a matter as the composition of the Dominion Parliament. Fortunately, the decision in one sense is welcome to the Dominion Government, for it saves it the trouble of going to the Imperial Parliament for an amendment of the Constitution, a procedure which is not merely slow but is regarded by Canadian Nationalists as a painful reminder of the dependence of Canada on the Imperial Parliament. As regards the merits of the judgment itself opinions in Canada and here will differ. One point is of special importance, the insistence of the Committee on the fact that the British North America Act must be regarded as a Constitution for a responsible and developing State; this is a hint that the Committee would now be ready to relax as regards the Dominions the rule of interpretation which limits Dominion legislation to territorial limits. The Dominion, as we have seen, has now adopted this doctrine, which may possibly be tested in the courts, but is more likely to be disposed of as the outcome of the next Imperial Conference. Accepting this view of the nature of the Constitution the rest doubtless follows. It is true that "person" is ambiguous, and that in some cases in the British North America Act it must be held to include females, while elsewhere male persons are specifically mentioned. It is, therefore, legitimate enough to give the word in regard to the summoning of Senators the wide sense. Yet it is clear that this was not intended by the Act, and it is impossible not to sympathize with the feeling, obviously strong in the Supreme Court, that the statute ought to be interpreted in the light of the prevailing rule of the exclusion of women from legislative functions which existed when the Act was passed. The judgment of the Committee is interesting also for its elaborate account of the historical development of the Canadian Constitution, which perhaps was not strictly relevant to the case but evidently interested the court.

The Control of Fisheries.—A similar breadth of exposition, due likewise to the comparative unfamiliarity of the members of the court with the issues, is seen in the judgment in *Attorney-General for Canada* v. *Attorney-General for British Columbia and Others*[1] regarding the power of the Dominion to regulate fisheries. By s. 7A of the Fisheries Act, 1914, it is provided that no one shall operate a fish cannery for commercial purposes without a licence from the minister, and s. 18 imposes the necessity of taking out a licence on persons operating a salmon cannery or a salmon-curing establishment in British Columbia. The brief point raised was whether the power of the Dominion to regulate sea coast and inland fisheries under s. 91 (12) of the British North America Act could be strained to the point of authorizing the control of commercial operations in respect of fish after they had been captured. This broad claim their Lordships had no difficulty in pronouncing invalid, and in fact it is difficult to see how it could be supported, and the Supreme Court of the Dominion pronounced unhesitatingly against it. It was, however, also attempted to defend the enactment on the ground that the matters dealt with were incidental to the power to regulate fisheries and might thus be deemed valid. But the Committee, while prepared to consider as possible the grant of power to inspect fish canning and curing establishments as incidental to carrying out legislation to prevent the taking of unfit fish or of fish out of season, was clear that there could be no justification for the system of licensing under the Act. The Committee had also to pass judgment on a subsidiary issue; the regulations for fishing in British Columbia, whose validity was not otherwise challenged, raised a point of construction. Could the minister in the exercise of his authority to grant licences exercise a discretion, so as *e.g.* to refuse licences to any special class of persons, such as Japanese? The majority of the Supreme Court, and the Judicial Committee, ruled that the terms of the regulations were not apt to confer on the minister any discretion in the matter of the grant of licences, a point which seems clearly justified by the unconditional wording of the power of grant.

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[1] 46 T.L.R. 1.

Claims against the Crown.—A very interesting point arose for decision in *Dominion Building Corporation, Ltd.* v. *The King*.[1] The Exchequer Court Act of Canada, s. 38, provides that claims against the Crown may be prosecuted by petition of right or referred to the court by the head of the department in connexion with the administration of which the claim arose. The Acting Minister of Railways and Canals referred in 1926 to the court a dispute with the appellant corporation regarding the failure of the department to sell to it certain lands in Toronto. Later, the Minister of Justice advised that the reference was not warranted by law, and purported to withdraw it. The court, however, declined to allow withdrawal, and the Supreme Court was appealed to. That court ruled that an appeal lay in the matter, and that the reference was invalid. From this decision appeal was brought to the Privy Council. The issue turned on the question whether the subject-matter fell within the administration of the Minister for Railways and Canals, and the Supreme Court answered this in the negative, holding that the negotiation of the contract and the whole project was a governmental undertaking as distinguished from a departmental piece of business. The Privy Council ruled that the Supreme Court had too narrowly limited the sense of the term "administration." It held that the power to deal with the administration of the ownership rights of property concerned remained with the minister, although by the Canadian National Railways Act, 1919, the management and use of the subjects in question had been transferred to the Canadian National Railways Company. Even if the administration were not otherwise vested in the minister, yet an Order in Council of 1923 was sufficient, in the opinion of the Board, to transfer it to him, though originally the matter might have been rather governmental than departmental. But the judgment is of importance in recognizing that matters may fall to a minister's control, not merely by statute or Order in Council, but also by usage. As the reference was made by a minister having authority, the Committee naturally held that it could not be withdrawn, and reversed the decision of the Supreme Court.

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[1] 46 T.L.R. 22.

The Locus of Specialties.—The Committee has reaffirmed, in *Royal Trust Company* v. *Attorney-General for Alberta*,[1] the doctrine that a specialty debt has a local situation at the place of residence of the testator for purposes of taxation. The debt which raised the point was a statutory bond of the Dominion. The register of bond-holders was at Ottawa, but payment of the principal sum was to be made at Ottawa, or, if desired, at Calgary, Alberta, among other places. The testator whose estate was in question died in Alberta, and the issue was whether the bond which passed by his death was situate within the province as required by the terms of s. 27 of the Succession Duties Act of 1922 of Alberta. Against this at first sight obvious conclusion it was urged, on the analogy of registered shares, that the real locality of the bond was Ottawa, where the register of owners was kept; but the Court of Appeal in Alberta as well as the Judicial Committee negatived this suggestion, insisting that the case of companies and governmental bonds were not parallel, apart from the fact that the obligation to pay, if desired, in Alberta might be held to give the bond a local situation there. The main ground, however, of decision in both courts was based on the old doctrine of the locality of debts by specialty, as laid down by Wentworth and recognized by Lord Field in *Commissioners of Stamps* v. *Hope*.[2] The only point which required to be decided was whether a bond, not being under seal, could be deemed a specialty. But this doubt was dismissed by the consideration that a statute debt has long since[3] been ruled to be subject to the term of prescription of a debt by specialty, and a debt of the King, evidenced by signature of a royal servant, must always have ranked as a specialty debt. The result, though technical, has clearly the merit of consonance with a reasonable interpretation of the provincial Act.

The Locus of Shares.—This well-worn topic was revived in *Erie Beach Co., Ltd.* v. *Attorney-General for Ontario*,[4] in which was challenged the validity of the Ontario statute[5] requiring that no property in the province belonging to any deceased person at the time of his death may be transferred, unless the duty, if any, is paid or security for its payment given, and in the event of a transfer being made without compliance with this provision, the company or person who transfers the property is made liable for the payment of the duty. There was, indeed, argued before the Board the view that shares were in the same position as obligations *ex contractu*, and on the principle *mobilia sequuntur personam* were assets taxable in the domicile of the deceased testator. This doctrine, though accepted by Logie J. in the Supreme Court of Ontario, was clearly untenable in view of the decisions in *Attorney-General* v. *Higgins*[1] and *Brassard* v. *Smith*,[2] and it was readily disposed of by the Board. There remained, however, a very real issue, whether the imposition of the tax on the company or person who might transfer the shares could be held to be direct taxation which alone is permissible to the province, or whether it was not virtually indirect taxation. The decisive consideration in the view of the Board was that, as pointed out in the Court of Appeal in Ontario, there was no provision whatever for the reimbursement of the company by the person to whom it had transferred the shares; the obligation was simply direct. It might be held that the effect of the provision was that, if proceedings were taken against the company for the misdemeanour involved in the breach of a statutory provision, it might rely on the provision as to payment as showing that the only penalty which could be imposed was the amount of the duty, but that would be determined in due course if necessary. It is clearly impossible not to agree with the view taken, nor, it is clear, is there any hardship in the case of the transfer of the shares of a company which by law must have its head office for transfer of shares in Ontario and so must be fully aware of the terms of the law.

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[1] 46 T.L.R. 25.

[2] [1891] A.C. 476, 481.

[3] *Cork and Bandon Railway Co.* v. *Goode*, 13 C.B. 826.

[4] 46 T.L.R. 33.

[5] R.S. Ontario, 1914, c. 24, s. 10.

The Dominion and Criminal Law.—A recent case in Quebec,[3] *Ex parte Fong*, *Ex parte You*, *Ex parte Chalifoux*, raises once more the disputed question of the extent of the power of the Dominion and the provinces in matters of criminal law. The subject of criminal law and criminal procedure is assigned exclusively to the Dominion, while the constitution of courts of criminal jurisdiction appertains to the provinces. In the case in question the issue which arose was whether a provincial Act[4] which allowed appeals from all judgments maintaining or quashing writs of *habeas corpus* was applicable to criminal matters, two of the persons concerned having been convicted under the Opium and Narcotic Drug Act of 1923 of Canada, and the third for the theft of a postal packet. All three were liberated on *habeas corpus* proceedings, and the Crown then appealed asserting that the provincial Act validly applied to the cases in question. The respondents, on the other hand, argued that the provincial Act, so far as it purported to deal with criminal matters, was *ultra vires*, the Dominion alone having authority. This, it must be added, is the view which has appealed in like cases to the courts of British Columbia,[5] of Nova Scotia,[6] and to the Supreme Court of Canada.[7] But in Quebec it has been ruled that *habeas corpus* proceedings must be regarded as civil proceedings and so within the provincial ambit of authority. The contention seems difficult to uphold; it is contrary to authority and is difficult to support on any clear line of reasoning. Still more difficult to follow is the suggestion made that, even if the legislation is considered to be on criminal matters, it is not invalid as not being repugnant to any federal Act, the Dominion not having legislated on *habeas corpus* appeals. Such a doctrine is applicable to a Constitution like that of the Commonwealth, where the powers of the States to legislate on many subjects remain, but are liable to be defeated by the exercise of the powers of the Commonwealth. It is clearly inapplicable to the case of the Dominion, where the provinces have no such right to legislate on federal topics when the federation has not passed laws.

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[1] 2 H. & N. 339.

[2] [1925] A.C. 371.

[3] [1929] 1 D.L.R. 223.

[4] R.S.Q. 1925, c. 167.

[5] *Re Tiderington* [1912], 17 B.C.R. 81; *Re Mah Shin Shong* [1923] 4 D.L.R. 844.

[6] *R.* v. *De Coste* [1888], 21 N.S.R. 216.

[7] *Re McNutt* [1912], 47 Can. S.C.R. 259, 263.

The Status of Canadian Indians.—Though the law on this matter in Canada is well settled, interest attaches to the effort[1] of a chief of the Mick Mack Indians to set up as a bar to conviction for an offence against the Lands and Forests Act of Nova Scotia[2] the terms of a treaty made in 1752 between Governor Hopson of Nova Scotia and the then chief of a band of Mick Mack Indians, under which free right to hunt and fish was recognized as belonging to the band. The claim was, perhaps, a little daring, for the chief who asserted it was a resident in Cape Breton and could adduce no evidence that he and his tribe were in any way connected with the band with whom in 1752 the treaty in question was made. Cape Breton, in fact, was then in the possession of the French, and the onus of establishing any right to the benefit of a treaty made with a tribe under English jurisdiction clearly fell on the chief. But the case was discussed on other grounds, and some interesting doctrines of rather dubious character were enunciated by the court. It was ruled that the Indians had not the capacity to enter into a treaty, and that the Governor for his part was equally without capacity; that such a treaty would have been invalid without ratification by the legislature; and that in any case it was counter to the terms of a subsequent statute which must prevail. The latter part of the doctrine is clearly valid, but neither of the other propositions appears wholly sound. It is clear that the English and American view never admitted that the Indians had the status of sovereign powers[3] with whom treaties in the full international sense could be made. But this fact renders it impossible to regard the Governor as incapable of making a so-called treaty with the Indians. He certainly had no authority—it was never granted to American Governors before the revolution or after—to make treaties proper with the foreign powers in America, but he could, as other Governors did, negotiate and make agreements with Indian tribes which were certainly binding on the Crown, and would have given the Indians civil rights enforceable in the courts against third parties, though of course subject to be overridden like all other private rights by statute, and, as against the Crown, merely affording grounds for applications by way of petition of right or appeals to the generosity and good faith of the sovereign. The numerous treaties which have been made with Indians in North America from time to time are essentially of the type of simple agreement, not international compacts, but their binding character has never been denied. In the case in question the court raised the issue whether, by the outbreak of hostilities shortly after the treaty between the Indians and the Crown, the treaty was annulled or merely suspended. But clearly the question is hardly thus to be regarded. Rather the issue was merely one of the effect on a simple contract of action by one party absolutely undermining the essential basis of the contract, namely the grant of rights by the Crown in return for loyalty and submission. The Indians, even had they been the predecessors of the Cape Breton chief, had by their disloyal action completely dissolved the contract, and the Crown was in no wise bound. The subsequent legislation, therefore, did not even override contractual rights. It was passed when such rights had vanished through the failure of the contract by which they were brought into being.

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[1] *Rex* v. *Syliboy* [1929] 1 D.L.R. 307.

[2] 1926, c. 4.

[3] Wheaton, *International Law* (ed. Keith), vol. i, pp. 101 f.

The Indian States Committee Report.—The authors of this Report can congratulate themselves on the generally favourable reception accorded to it in the United Kingdom and in India alike. It is natural that supporters of the extreme claims of the Princes should have been inclined to complain that the Report does not deal in detail with the ingenious argument presented for the rulers, based on the terms of the treaties concluded between their predecessors and the East India Company. Why, it is asked, should usage and prerogative be permitted to derogate from the express terms of compacts such as that between the Nizam and the Company in 1800, which excludes the Company from any concern with the subjects of the ruler? Even if a treaty has been in practice disregarded, the weaker party having yielded to *force majeure*, can it not now be relied upon and its literal terms demanded? The answer to such suggestions appears clear. A compact of any sort can be interpreted correctly only by reference to the system of law, which must be deemed to have been in the minds of the contracting parties, the proper law of the contract. Now it is clear that the treaties of the East India Company were not contracted under the European system of international law, which had never been extended to Indian Princes *inter se*, and of which they were ignorant. The compacts, therefore, must be judged on the basis of the international law of contemporary India, and this law was dominated by the conception of paramount power. To the position of paramount power the Company attained by its conquests, and it proceeded to exercise *vis-à-vis* the States with which it had agreements the rights arising from paramount power. If this fundamental fact is not accepted, then the proceedings of the Company and of the Crown in succession to it become unintelligible. It was possible to allow the treaties to stand unaltered, in lieu of denouncing them with changed circumstances, simply because it was recognized by all parties that the position of paramount authority carried with it overriding rights. The only other criticism of importance which has been adduced is the objection to the view[1] "that the relationship between the Paramount Power and the Princes should not be transferred, without the agreement of the latter, to a new government in British India responsible to an Indian legislature." No doubt this doctrine might be pushed to absurd lengths, but in itself it is clearly justified,[2] and for their part the Princes have shown themselves perfectly willing to consider in what manner their relations with British India can be redefined, with a view to the harmonious evolution of Indian self-government.

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[1] Parliamentary Paper, Cmd. 3302, p. 52.

[2] *Journal of Comparative Legislation*, Third Series, vol. x, pt. iv, pp. 301, 302.

NOTES.

Indian Prisons.—*A Rejoinder.*—The article on Indian Prisons by Mr. J. Chinna Durai, which appeared in the November number of the *Journal*,[1] is a fairly true picture of affairs years ago.

If Mr. Durai has read the annual administration reports of the past five years, he should know that considerable progress has been made in several provinces.

Much, of course, remains to be done; the great obstruction to the Indian prison system becoming still more progressive is the enormous cost involved. It would mean rebuilding the majority of the jails in India, and as long as the present financial stringency exists, this is not practical politics. The Government of India and the local governments are fully aware of the shortcomings, the present heads of the various jail departments are all very keen on getting things done, have closely studied the prison systems of the United Kingdom, and have personally visited various prisons and allied institutions in the United Kingdom and other countries in Europe.

Madras is the most progressive province as far as prison administration is concerned. This is partly due to the more modern construction of their central jails and also to the personal enthusiasm of the present Inspector-General, who has been fortunate enough to persuade the local government to introduce several important reforms. The after-care of prisoners is also more flourishing than in other provinces, as voluntary workers are apparently more numerous in Madras than in other parts of India.

As I consider Mr. Durai's description of the Indian prison system to be incomplete in some respects, I propose to comment on his article under the headings he has given.

Indian Prison System.—Mr. Durai has not explained one very important difference between the central and the district jails. The superintendents of central jails are whole-time officers who have entered the jail service as a definite career; they have no other official duties to perform. The superintendents of the district jails in most provinces, on the other hand, are part-time officers, which is, obviously, a very unsatisfactory state of affairs, but, like many other things in India, this is done for economy; in most provinces the superintendents of district jails are the civil surgeons of the district; they are busy men and have little time to spare over the administration of the jail under their charge. The

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[1] *Journal of Comparative Legislation*, Third Series, vol. xi, pt. iv, p. 245.

Inspector-General of Prisons has no say in the appointment of a civil surgeon who is posted by the local government on the recommendation of the head of the Medical Department of the province, and thus becomes *ex officio* superintendent of the district jail. This makeshift system has been abandoned in Madras and Bombay for many years past, and the Punjab has followed suit since 1927. In the rest of India the old system is still in force. The Government of Bengal have given administrative approval to the three largest district jails in that presidency being given whole-time superintendents, the civil surgeons being retained only as medical officers. I hope funds to carry out this important reform will be found in the next provincial budget.

As the number of girl delinquents of adolescent age is so small in India I doubt if the expense of building separate Borstal institutions for females is justifiable until other more urgent needs have been provided for.

Prisoners under remand or awaiting trial are kept in separate jails in the district or central jail as the case may be. In Madras there are separate extra-mural jails for prisoners under trial. The construction of a separate jail for the under-trial prisoners of Calcutta is under consideration. The accommodation of under-trial prisoners is one of the most unsatisfactory features of the Indian prison system. The whole question is, however, now being discussed by the central and local governments at a Conference in Delhi. There is a separate prison for women in the Madras Presidency and there is a scheme to build one in Calcutta. Female prisoners are confined in special parts of the ordinary jails, quite separate, of course, from male prisoners. The number of female prisoners in India is far less than in other countries: in Bengal the average daily number of women prisoners is about 100 (including those under remand); the daily average of all classes of prisoners in Bengal at present is about 13,000.

It is remarkable that Mr. Durai has omitted to mention one of the most peculiar features of the Indian prison system, *i.e.* the convict officer system.

In old days, before the importance of strict classification and segregation was recognized, the convict officer system no doubt was justified; it was an incentive to good conduct and offered substantial advantages in the matter of extra remission and other special privileges. Convict officers assist the paid warders in guarding and supervising the work of ordinary prisoners. Of course it has saved the government enormous sums of money which otherwise would have been necessary for the pay of extra warders, to say nothing of the capital expenditure for the construction of barracks and other buildings.

Convict officers are even employed to assist in the guarding of prisoners under trial, a quite indefensible proceeding. I am glad to say, however, that this will soon be a thing of the past. To abolish completely the convict officer system would involve a cost of money that would be prohibitive at present, but their numbers can be largely reduced, and this is being done in all provinces as funds become available. There are other disadvantages in the system which I have no space to enlarge on. It is only fair, however, to state that many jail administrators of experience defend the system, but personally I am convinced that the disadvantages outweigh the advantages, though I would accept a modified system with reduced numbers and responsibilities.

I do not quite understand the classification of prisoners mentioned by Mr. Durai. I have never heard of his "intermediate class" of offenders. The obsolete construction of the majority of jails prevents any really strict system of classification being carried out; that is one of the weak spots of the Indian prison system. Reservation of jails for special classes of prisoners has been carried out recently; special jails for habitual prisoners have proved a distinct success.

With the exception of the Madras Presidency, the amount of separate cellular accommodation is grossly inadequate. This is recognized by most of the local governments, who have accepted in principle that at least 33 per cent. of the accommodation should be cellular; the cost of building the extra cells has so far been the stumbling-block. I have never heard any responsible authority use the argument that the association at night in dormitories is essential for the well-being of the prisoners. It is true that Indian non-official opinion dislikes the idea of separate cells. Separate accommodation is quite wrongly called solitary confinement, even if the prisoner only occupies the cell at night. Mr. Durai has not mentioned the pernicious form of imprisonment known as "simple imprisonment" or imprisonment without labour, a most demoralizing form of confinement. It is possible for a man to sit idle for six months or a year without doing a stroke of work; it is impossible to imagine anything more degrading. I am glad to state this form of imprisonment has not been so frequently inflicted during the past three or four years. It is to be hoped it will be abolished before long.

Mr. Durai has not mentioned anything about the remission system: every prisoner with a sentence of six months or more is placed on the remission system. The maximum amount of remission which can be earned by a convicted prisoner for good work and exemplary conduct is 25 per cent. of the sentence. The remission system is greatly appreciated by the prisoners and is a great incentive to good conduct.

Since the Indian Jails Committee of 1919–20 submitted its report, most of the provinces have instituted advisory boards for the premature release of long-term prisoners; in Bengal it is confined to first offenders who have completed two-thirds of their sentence including remission earned.

Prison Reform.—It is quite true that in the past the advance of prison reform in India was regrettably slow, but I do not agree with Mr. Durai when he states that reform has been at a standstill, owing chiefly to a spirit of contentment.

The Indian Jails Committee of 1919–20 was a very comprehensive one, and not at all of the character that Mr. Durai leads one to suppose. Before the members arrived in India they made a detailed tour of the prisons in England and Scotland. They then proceeded to the United States of America and closely studied the prisons and reformatories in several of the states. They then visited Japan, the Philippines and Hong Kong before they started their actual work in India. Their report and the recommendations they put forward are very valuable, but, as already stated, it will not be possible to carry out all the recommendations as quickly as one would desire, owing to the great expense involved, at a time when there is severe financial stringency.

The Committee was under the chairmanship of Sir Alexander Cardew, and the six other members included two non-official Indian gentlemen and a prison expert from England.

Several reforms have taken place since 1921, considerable advance has been made in the rational treatment of juvenile delinquency, Borstal Acts have been passed in at least three of the provinces, there are very efficient Borstal schools at Tanjore and Lahore, and last year Bengal followed suit with a Borstal school at Bankura. Advisory boards for the premature release of long-term prisoners have been instituted, and several other recommendations have been carried out which did not involve prohibitive expenditure. One of the recommendations of the Committee was the institution of a biennial Conference of Inspectors-General of Prisons from all over India ; the Conference meets in a different province every two years. Far from being the useless affair that Mr. Durai thinks it is, I have no hesitation in saying that the Conference has strengthened the cause of prison reform enormously. It is a valuable means of exchanging views and learning what has been done in other parts of India. This Conference also strengthens the hands of the Inspector-General when he is trying to press his Government to take action in jail matters. If Mr. Durai has read the resolutions passed at the second and third Conferences, held in Madras and Calcutta, he would learn that the heads of the various jail departments in India are not afraid of progress. It is true that many of the recommendations have not been carried out owing to the cost involved, but the Conference brings prison reform prominently to the notice of the Government of India, and they cannot plead ignorance of the important problems brought before them. The fourth Conference is being held this month in Lucknow, and very important matters of prison reform are being reported to the Government of India.

Jail Industries.—I do not know what evidence Mr. Durai has to support his statements that prisoners are so ruthlessly exploited while in jail that they refuse to avail themselves on release of the work they have learnt during their imprisonment. It is true that recidivists usually relapse into a life of crime, but I know of cases where ex-prisoners have been able to make a livelihood by the work they have learnt in jail. Of course, it is notorious that any ex-prisoner finds it almost impossible to obtain work if it is known that he has been in jail, but that is not the fault of the jail authorities. What is needed is an efficient after-care association and an enlightened and sympathetic public who will give help to deserving ex-prisoners.

Education.—I agree with what Mr. Durai has stated about the importance of education as a means of reformation for Indian prisoners. I consider education to be the most reformative influence in a jail. I have found in Calcutta that offences against discipline have greatly diminished amongst prisoners attending educational classes. In Madras there is compulsory primary education for all long-term prisoners under twenty-five years of age. In 1927 compulsory primary education for all adolescent prisoners (from sixteen to twenty-one years of age) was introduced into the two large jails in Calcutta. This has proved such a success that the Government of Bengal will extend it to all five central jails when funds are available. Lectures and lantern demonstrations are now given to prisoners in several provinces. In 1925 I witnessed a play in costume acted by star class prisoners in the central jail of Bellary in the Madras Presidency.

There is an excellent library for the educated prisoners of the Calcutta jails. I believe there are libraries now in most provinces for educated prisoners. It must be remembered that about 97 per cent. of convicted prisoners in India are completely illiterate, so that to provide libraries in all jails is not necessary until compulsory education has been introduced.

Scout work and ambulance classes have been introduced for adolescent prisoners in some provinces. The Madras Presidency, Central Provinces and, I think, the Punjab publish a special newspaper for the use of the prisoners, which is read out to the illiterate prisoners once a week.

Religion.—Since 1921 provision has been made for the religious needs of Hindu and Mohammedan prisoners. Approved voluntary instructors are allowed to enter the jails and impart religious and moral teaching to their co-religionists. In Bengal nearly all jails have congregational prayers for Mohammedan prisoners. In cases where an outside *moulvie* cannot be obtained, the service is conducted either by a Mohammedan jail officer or by a well-conducted Mohammedan prisoner selected by the Moslem prisoners themselves.

The trouble about religious instruction for Hindu and Mohammedan prisoners is that the government have not provided paid instructors; it is very difficult to find voluntary teachers to take up this work, as they only get bare out-of-pocket expenses for carriage hire.

Punishment.—The most common punishment at the present day is forfeiture of remission earned by prisoners who are on the remission system.

Flogging is now restricted to offences of serious assault and mutiny. In Bengal this punishment can only be inflicted after recommendation of a Committee of Inquiry consisting of the district magistrate and two non-official visitors; final sanction is given by the Inspector-General of

Prisons. In 1928 there were five prisoners in Bengal punished by whipping out of a total number of jail offences of 21,117, the ratio of whipping to the total number of punishments being ·02. Whipping is inflicted with a rattan cane and not by the cat.

The unauthorized punishments mentioned by Mr. Durai were inflicted by jail warders and convict officers in the Punjab. The Punjab Jail Inquiry Committee, 1926, investigated these cases and made important recommendations to prevent such barbarities in future.

Indulgence.—I agree with all that Mr. Durai has stated in this connexion. The jail warders are overworked and underpaid. The only way of stopping the abuses mentioned is to make the conditions of service attractive enough to induce men of a better and more educated class to enter the warder service. Since November, 1928, the Government of Bengal have substantially increased the pay of the warder staff of that presidency. The jail warder now draws Rs. 2 *per mensem* better pay than the ordinary police constable. It is to be hoped that a better class of men will be attracted by the improved pay. A training school is badly needed.

Jail Officers.—There is a good deal of truth in Mr. Durai's remarks under this heading, but the strict system of audit of the General and Manufacture Departments introduced the last four or five years has practically abolished most of the abuses which were so prevalent in the past. I hope that with the introduction of training schools and recruitment of a better class of men the moral tone of the jailor class will improve in the future. Many Indian jailors are men of the highest character and can be thoroughly trusted, but it is true that there have been black sheep in all provinces.

Racial Differences in Jail.—As the Government of India have addressed all the provincial governments on this matter two months ago, and the whole question of differential treatment is *sub judice*, I refrain from comment. Orders on this subject may be expected to be issued at any moment.

Recruitment of Jail Officers.—Indian medical officers who enter the Jail Department for whole-time service in the present day are men who are keenly interested in penal reform, otherwise they would not stay in it. They sacrifice much by jail service. At the present time the post of superintendent of a central jail is one of constant anxiety and worry. If Mr. Durai had served for one year as whole-time superintendent of a central jail in Bengal, I think he would modify his opinion about it being a haven of rest. The political unrest of the past ten years has profoundly affected the Jail Department; the difficulty is to find men to take up the thankless task. Before an I.M.S. officer is allowed to have charge of a central jail he must now undergo a course of training under an experienced superintendent; he is there on probation for a period of two years before he is confirmed in the Jail Department.

I certainly would not restrict the whole-time service to I.M.S. officers;

in fact it will not be possible to do so, as conditions nowadays are so unattractive. There are already non-medical whole-time superintendents of experience, but the Indian Medical Service has a fine record of service in the Jail Department. Dr. Mowatt and Sir Alfred Lethbridge were great prison reformers and medical administrators and improved the health of the jails and conditions generally in the prisons of India.

I do not understand Mr. Durai's remark about a man being appointed at the fag-end of his service to draw an enhanced pension. I have never heard of such a case and would like to know how it could happen. Even Inspectors-General of Prisons, although they are administrative officers, do not get any extra pension beyond the ordinary pension for the number of years they have served. All part-time superintendents should be abolished. No more Commissions are needed at present; the programme of the 1919–20 Committee has still to be completed and Jail Committees of Inquiry have sat in the Punjab, Bengal and United Provinces in 1926, 1927 and 1929 respectively.

What is needed is money to place the Indian prison system in a condition comparable with that of the United Kingdom.

W. GAVIN HAMILTON, Lieut.-Colonel, I.M.S.
Late Inspector-General of Prisons, Bengal.

Istituto di Studi Legislativi.—In 1924 Professor Salvatore Galgano, of the University of Naples, read a paper before the *Sezione di Scienze sociali e giuridiche* of the *Società italiana per il progresso delle scienze,* advocating the establishment of an Institute of Legislative Studies. Soon afterwards the *Istituto di Studi Legislativi* was founded in close association with the Italian Ministry of Justice. Professor Galgano is its Secretary-General and Editor of the Institute's *Annuario.* The objects of the Institute are defined by its Statute in the following terms:

Art. 2.—"The Institute proposes as its object the general encouragement of legislative studies and the improvement of legislation. In particular it will apply itself to: (1) promoting studies in comparative law, in history, in statistics and economy applied to law, so far as they can contribute to the preparation of legislative reforms; (2) studying in their practical application legislative reforms and laws in general, foreign laws included, taking, where opportunity offers, the initiative in appropriate investigations, and facilitating the knowledge of laws in Italy by a continuous educational propaganda; (3) encouraging the ascertainment, collection and publication of customs, and as occasion offers, their translation into statutory rules; (4) co-ordinating and appreciating the work of those who in Italy devote themselves to the study of legislative problems, and promoting their object by supplying the necessary means of investigation."

Art. 4.—"To realize these ends, the Institute (1) will endeavour to secure the fullest possible documentation of every form of activity, public or private, directed to the preparation of laws, at home and abroad; will form a special library, publish a Bulletin and prepare the other means calculated to facilitate the fullest possible utilization of the material collected; (2) will provide for the collection of Italian laws and for the translation of foreign codes and laws; for the periodic publication of *indices* and *compendia*, co-ordinating the legislative enactments on each several topic and exhibiting in each of them the condition of the law in being at any given time; (3) will hold periodic and extraordinary meetings and will promote national juridical congresses; will prepare and organize their labours; co-ordinate and summarize the results; (4) will establish contact with similar institutions in foreign countries, and will promote scientific relations between students of legislative problems."

By Art. 4 the Institute is composed of *soci effettivi, soci aggregati, soci correspondenti* and *soci benemeriti*. By Art. 5 the active members must not exceed the number of 120 and must all be of Italian nationality.

The first-fruits of the labours of the Institute are to be seen in these imposing volumes,[1] containing some 2,000 closely printed quarto pages, and a further instalment on the same ample scale is understood to be going through the press; all this under the indefatigable direction of Professor Salvatore Galgano. It is impossible in the space available for the purpose to do more than indicate in the most summary fashion the nature of the contents.

The first volume consists of two parts. Part I is divided into three sections. Section I consists of general studies pertinent to the objects of the Institute. The first of these reproduces in substance Professor Galgano's paper mentioned above. This is followed by an article on "The Roman Law and the Reform of the Codes," by Professor Pietro Bonfante. Professor Rabel writes on the "Changes in the German Civil Code from 1900 to 1925"; Professor Adamovich on "Administrative Legislation in the Austrian Republic"; Professor Balogh on "Post-war Legislation in Hungary," and on "The Law in being in Lithuania" (two papers); Professors Bohacek, Xavery, Maddison and Ganeff on legislation in Czechoslovakia, Poland, Esthonia and Bulgaria respectively.

Section II contains a series of papers bearing upon the Italian draft Code of Commerce by Professors Mossa, Gieseke, Breglia, Del Giudice, and Dr. Giovanni Nicotra; an article by Professor Fulvio Maroi on "A Collection of Popular Customary Law," and another by Professor Wieland on "The Revision of the Law of Obligations in Switzerland."

Section III contains bibliographical notices, relating for the most part to the year 1925, for Italy, France, Lithuania, Poland, Switzerland, Germany, Hungary and Austria.

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[1] *Annuario di diritto comparato e di studi legislativi*, vol. i, Roma, 1929. Pp. xviii + 793, 4°. Vols. ii and iii (in one). *Istituto editoriale scientifico*, Milano, 1929. Pp. xvi + 1145, 4°.

Part II contains notices on Italian and foreign legislation, and on the decisions of the Italian and foreign tribunals. The English section under both of these heads is contributed by Professor Winfield of Cambridge and Professor Sarfatti of Turin.

Volumi II and III constitute a single volume with continuous pagination. This exhibits the same general character as Vol. I, but with more elaboration of detail and perfection of method. A special feature of this volume is a collection of decisions in the field of private international law. The *Annuario*, as stated in the preface to the first volume, is mainly concerned with private law, but not to the exclusion of the major problems of public law. Accordingly, a considerable section of this volume is devoted to the constitutions of various European countries. The topics discussed are the following: Part I, section I: "The German Code from 1900 to 1925," by Professor Rabel (second instalment); "Austrian Private Law since the War," by Professor Bartsch; "German Constitutional Law," by Professor Bilfinger; "The Post-war Constitution of Hungary," by Professor S. von Egyed; "The Sources of Rumanian Civil and Commercial Law," by Professor Radulescu; "The Sources of Bulgarian Law," by Professor Ganeff.

Section II contains: "The Reform of Commercial Law in German Jurisprudence," by Professor L. Mossa; three papers on "The (Italian) Draft Code of Civil Procedure," by Professors Betti, Fritzsche and Václav Hora; "Aspects of Hungarian Procedure," by Professor Geza de Magyary; "The Draft Polish Law of Civil Procedure," by Professor Xavery Fierich; "Proceedings before the Mixed Arbitral Tribunals for Carrying out the Peace Treaties," by Dr. Ciancarini.

The above matter occupies about one-quarter of this volume. The remaining three-quarters are devoted to reviews and notices, to summaries of legislation and of jurisprudence (the English sections are again contributed by Professor Winfield), with a special appendix of decisions upon private international law rendered by the courts of Italy, France and Switzerland; lastly to a Bibliographical Compendium. The whole concludes with a series of carefully executed indices.

In this country no university has yet established a chair of Comparative Law. How long shall we remain indifferent to a movement which is revolutionalizing legal studies upon the Continent and which includes our law within its scope? The idea of a *droit civil mondial* which hovers before the eyes of so many Continental jurists is not one to make an appeal to English lawyers. The objects of the *Istituto di Studi Legislativi*, however, as outlined above, seem to be of a more immediately practical character, and may, as such, awake our interest. Enormous labour has gone to the preparation of the *Annuario*; we offer to Professor Galgano our congratulations on the success which has attended his efforts.

R. W. LEE.

The Compulsory Insurance of Emigrants.[1]—The question of compensation for accidents on board ship is one of great importance for emigrants. The law as it stands nationally and internationally is far from satisfactory, and there can be little doubt that the present state of affairs is such as to involve a considerable degree of injustice to emigrants who are injured in the course of a voyage, and to the dependents of those who lose their lives as the result of a shipwreck. In the case of the *Titanic*, the 825 victims received less than £25 each, and in the case of the *Empress of Ireland*, 840 victims only received an average amount of £43. The matter does not rest there, however, because, apart from questions of the amount of compensation, the victim of a disaster at sea may find himself or herself in a very difficult position. The questions which arise are manifold. What law is to be applied? What are the provisions of that law which deal with the claim? How far is the shipowner protected either by statute law or by clauses in the contract of carriage? On whom does the onus rest of proving liability? The question of providing compensation in such cases free from the confusion of the existing law has been debated for some time past. There have been two movements on foot. One was started by the International Emigration Commission held at Geneva in 1921, attended by representatives of fourteen countries, and held in pursuance of the resolutions of the Washington Labour Conference, 1919, which provided for a scheme of insurance of emigrants and their dependents against the risk of death or disablement. Concurrently, the International Maritime Committee initiated a movement for a scheme which should be voluntarily adopted, but which should provide for adequate compensation to injured emigrants, and to the dependents of those who lost their lives at sea. There the matter rests for the moment, and the future will show whether legislation will be adopted as the result of a Convention under the auspices of the League of Nations or whether the matter will be left to be developed by voluntary action along the lines of the York–Antwerp Rules. The International Conference of Private Organizations for the Protection of Migrants has, in the meantime, come to an agreement with the shipping interests by which the matter is to be discussed at a further conference, and it is to be hoped that the outcome of the discussion will be the satisfactory solution of a difficult problem. The short point is this: How can adequate protection be secured for emigrants without imposing burdens on shipowners which might involve the increase of emigrant passenger rates to a prohibitive amount.

The Berlin Institute for the Study of Foreign Laws and Private International Law.—In an article published in a recent number of this *Journal*, Professor J. Eggen van Terlan gave an account of the remarkable development of the study of comparative law in Continental universities.[1]

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[1] *Passenger Insurance*, a report presented to the International Shipping Conference, by Sir Norman Hill, September 1928.

Equally, if not more noteworthy, is the foundation of the so-called institutes for the study of foreign laws.

For example, the Berlin Institute,[2] under the direction of Professor Ernst Rabel, sets itself to investigate foreign laws upon special topics, frequently in connexion with problems of German legislation or with debatable questions arising out of decisions by the court. Such investigations are now proceeding as to company law, bankruptcy law and the law of the Stock Exchange, and the Institute is also preparing a comparative view on a large scale of the law of obligations.

Another of its publications is an annual volume containing reports of all the decisions by German courts in cases of conflict of laws. The decisions are collected from a great number of German legal periodicals, very few of which are accessible to lawyers in this country, and this annual volume or *Sonderheft* of the *Zeitschrift* is extremely useful and ought to be much better known than it is. The cases for 1926 and 1927 were collected together in one *Sonderheft*, and the cases for 1928 are contained in the volume before us.

Among the numerous cases in 1928, we might draw attention to the group of decisions dealing with the difficulties created by the Austrian law as to administrative dispensations from impediments to marriage.

The Bavarian *Oberlandesgericht* has held that an Austrian Roman Catholic divorced in Austria *a mensa et thoro* cannot contract a second marriage in Germany. The *vinculum matrimonii* had not been dissolved, and a dispensation to contract a second marriage granted by the administrative authority in Austria would not be recognized by the civil courts in Austria and, therefore, not by the German court (p. 73).

The Berlin *Landgericht* III has held that the German court is competent to dissolve the marriage of American citizens if the husband is domiciled in Germany. The German court accepts the *renvoi* which is made by American law (p. 151).

A Jewish divorce in Germany, valid by Jewish law, is not recognized by the civil law, and it is immaterial that the consorts were Russian subjects and that the Russian law at the time would have recognized the religious divorce (*Oberlandesgericht*, Kiel, p. 148).

In two cases the status of statelessness is affirmed.[3] The *Reichsgericht* has held that the wife of a citizen of Alsace-Lorraine who, after the Treaty of Versailles, had not exercised her option of becoming a French citizen, was stateless (p. 194). The *Landgericht* of Königsberg holds that a German woman, by marrying a Soviet Russian, becomes stateless. She loses her German nationality by marrying a foreigner, and does not acquire Russian nationality because, by the law of the

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[1] Third series, vol. xi, p. 194.

[2] *Institut für Ausländisches und internationales Privatrecht*, Berlin, C. 2, Schloss.

[3] See in England, *Stoeck* v. *Public Trustee*, [1921] 2 Ch. 67.

Soviets, each of the consorts preserves his or her separate nationality (p. 197). These are merely a few examples selected from 152 cases in a volume of 207 pages. There are short but useful notes to the cases.

F. P. W.

Renvoi.—If an Englishman dies domiciled in France his personal estate is distributed according to French "municipal" law, and his will if he was testate, cannot defeat the legal claims of his widow and children.[1]

If an Englishman dies domiciled in Italy his personal estate is distributed according to English "municipal" law, and the legal provisions which the Italian law makes for a widow and children do not affect his estate.[2]

This is the rather singular result of the two most recent English decisions by courts of first instance, based, of course, in each case on the evidence of experts in the French and Italian laws respectively. Continental lawyers would say that French law accepts the *renvoi* from English law, whereas Italian law does not accept it. And it would seem that the fortune of real estate situate in the foreign country will be the same as that of the personal estate, because in both the French and the Italian laws the succession is global. *In re Annesley* was concerned, so far as it appears, with moveables only, but in *In re Ross* both elements were present. As to the immoveables Luxmoore J. held: "The succession to the immoveable property situate in Italy of an English testator domiciled in Italy is to be determined by Italian law, namely, in the same manner as English courts would determine it if the property belonged to an Englishman and was situate in England."

For the benefit particularly of our foreign readers, we give the head-note in the last case: "The succession to moveable property wherever situate is governed by the law of the testator's domicile, that is to say, the whole law of the country of domicile, including the rules of private international law administered by its tribunals.

"The inquiry in an English court before which such a question of succession is, therefore, is what the courts of the country of domicile would decide in the particular case. The result is that, where by the law of the domicile the succession to the moveables of a testator depends on the law of that testator's nationality, an English court will hold that the succession is governed by the law of the nationality and not by the municipal law of the domicile."

Luxmoore J. declined to accept the suggestion thrown out by Russell J. in *In re Annesley*, which was referred to in a previous number of this *Journal*.[3]

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[1] *In re Annesley*, [1926] 1 Ch. 692.

[2] *In re Ross*, December 6, 1929, T.L.R., XLVI, 61.

[3] Third Series, vol. ix, p. 276. The *dictum* of Russell J. is at pp. 708 and 709 of [1926] 1 Ch.

That *dictum* was: "When the law of England requires that the personal estate of a British subject who dies domiciled according to the requirements of English law in a foreign country shall be administered in accordance with the law of that country, why should this not mean in accordance with the law which that country would apply not to the *propositus* but to its own nationals legally domiciled there?"

As we understand that *In re Ross* is going to appeal, there is every reason to hope that the position of the doctrine of *renvoi* as a part of English law will be settled.

F. P. W.

Unification of French and Italian Laws.[1]—The Draft Code of Obligations and Contracts for France and Italy together has now been published in both languages in a handsome volume. We have already referred to this important project in a previous number of this *Journal*.[2]

With the Draft is now circulated a report to the French Minister of Justice by M. Ferdinand Larmaude on the whole subject of unification of French and Italian laws. This will be noticed in a later number, and we hope to have an article on some of the main features of the Draft Code, and particularly on its treatment of the formation of contract.

Russian Soviet Marriage.—The judgment of Hill J. in the Divorce Court, holding a Soviet marriage to be no marriage at all in the sense of English law, will excite attention abroad as well as in England.[3]

The suit was one at the instance of a Russian woman for judicial separation, and the respondent entered an appearance under protest and alleged that the court had no jurisdiction, as the marriage had been dissolved by a certificate granted by the Russian Consulate in Paris in accordance with Soviet law.

The evidence of Russian lawyers was to the effect that by the Soviet law marriage might be terminated either by the mutual consent of both spouses or at the unilateral desire of either of them.

Under the law of 1927 the dissolution must be registered at the proper office of registration, and nothing further is necessary. The lawyers were not agreed as to whether the marriage in question could be dissolved by registration in Paris.

The court held, however, that it was unnecessary to decide this question, and that it had no jurisdiction to do so. The question to be decided *in limine* was whether the marriage had ever existed. The Divorce Court was created to dissolve " marriages," and the meaning of " marriage " was a question of English law. This opened the whole discussion as to the nature of marriage. The authorities were clear that marriage under a law which recognized the plurality of wives was not " marriage " in the English sense.[1] It had not been expressly decided that a union dissoluble at will was not marriage, but Hill J. adopted the definition of Lord Penzance in *Hyde* v. *Hyde* that marriage was " the voluntary union *for life* of one man and one woman to the exclusion of all others." The divorce courts remind us pretty often that marriage is not always *de facto* a union for life, but, according to this decision, it must at least be entered into *sub specie aeternitatis*.

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[1] *Projet de Code des Obligations et des Contrats.* (Paris: *Imprimerie Nationale*, 1929.)

[2] Third Series, vol. x, p. 311.

[3] *Nachimson* v. *Nachimson, The Times*, December 17, 1929.

F. P. W.

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[1] *Hyde* v. *Hyde*, [1866] L. R., 1 P. and D., 130.

NOTICES OF BOOKS.

THE CONSTITUTION OF THE EMPIRE.

In *The Dominions and Diplomacy: the Canadian Contribution*,[1] Dr. A. Gordon Dewey presents a careful and illuminating study of the inter-relations of the several parts of the Empire from the point of view of foreign politics. The author views the matter mainly from the Canadian aspect, and the politicians of the Irish Free State would hardly agree with his view that it is Canada which has definitively led the way in the definition of Dominion status. In fact, however, the claim is doubtless justified. The tendency of Imperial development has in the main been directed by the attitude adopted by Sir Wilfrid Laurier in the pre-war period, and that of Mr. Mackenzie King in the critical years from 1922. Dr. Dewey suggests that critics have somewhat unfairly blamed the British Government for the failure of co-operation seen in the famous discussions as to the treaty of Lausanne, and that there was clearly no real desire on the part of Mr. King to maintain active touch with foreign affairs (ii. 158). This statement is doubtless true, but the gravamen of the charge brought against the British Government by its critics is that, knowing as it must have done the difficulty of keeping Canada in active co-operation, it should not have given the Dominion the excuse which it did of claiming that its position had been ignored. But on this, as on all the other important issues of the post-war period, the author's work has great value by reason of the fullness with which he sets out the progress of negotiations and the expressions of view by the governments and opposition leaders in the Empire. This work is accomplished with much care and fairness, and it sheds a very interesting light on the complexity of the issues and the lack of clearness upon them prevalent throughout the Empire. Of chief novelty will be found the author's reflections (ii, 338–41) on the Monroe doctrine in its relation to Canada, and the probable future of Imperial relations. It is satisfactory that he holds (ii, 361) that, as the Dominions come to turn their attention more and more to foreign affairs, they will realize that they have far more in common with the other parts of the Empire than with any foreign power, and will develop the habit of autonomous co-operation.

While Dr. Dewey carefully avoids efforts at definition of the legal relations of the parts of the Empire, Dr. G. Faucon, in *Le Statut de l'Etat*

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[1] *The Dominions and Diplomacy: The Canadian Contribution.* (London: Longmans, 1929.) 2 vols. Pp. xv + 375; vi + 397. Price 45*s.* net.

Libre d'Irlande[1] is chiefly concerned with an effort to determine such interesting questions as whether the Free State is a State of international law and the juristic character of the British Empire. He determines that Canada has not been the leader in the evolution of Dominion sovereignty. This honour is reserved for the Free State, which since its origin has been a sovereign State. If it does not exercise all the functions appropriate to this status, the refraining from doing so is voluntary for practical reasons. It is difficult to accept this reasoning. The British Government never recognized the Irish insurgents as belligerents, nor was recognition accorded by any other power. It consistently declined to treat the agreement for a treaty of 1921 as an international treaty, and the agreement itself definitely confers on the Free State the status of Canada, subject to certain restrictions which seriously infringe on the independent position of the Free State by compelling it to afford facilities for coast defence, thus preventing it in case of war from claiming the right to be neutral, even assuming that a Dominion can assert such a right. Dr. Faucon, however, admits (pp. 108–14, 193) that the Dominions have not the right to declare war or neutrality, so that it is clear that they are hardly fully sovereign, even in his own view. He holds further that their sovereignty has been conferred by the report of the Imperial Conference of 1926, but it is not explained how the declaration of a number of Prime Ministers, not homologated even by their Parliaments, can create an international status, nor does the author realize that so far treaties are not concluded without the necessary action of the Secretary of State for Foreign Affairs. He holds further (p. 63) that the right of secession has been accorded to the Dominions, but, as he treats Mr. Bonar Law in 1920 as Prime Minister of the United Kingdom, his view is hardly convincing, and his final opinion (p. 212) is that, when the Free State desires to secede, it will be compelled to agree to a treaty of alliance which will leave matters much as they at present are. One must, however, agree cordially with his final judgment : *Pour le moment, l'Etat Libre d'Irlande a tous les avantages d'une République et toutes les prérogatives qui s'attachent à son association avec le Commonwealth des Nations Britanniques.*

On the thorny issue of the classification in international law of the British Commonwealth Dr. Faucon arrives at the legitimate conclusion (p. 207) that the Commonwealth is unique in character, approaching the nature of a confederation of States, but resembling rather an entente between sovereign States which agree that one of their number should play a predominant part in the conduct of affairs of common interest. F. Berber, in his dissertation *Die Rechtsbeziehungen der britischen Dominions zum Mutterland*,[2] finds no serious difficulty in ranking the Commonwealth as a *Staatenbund* " *mit dem Symbol einer gemeinsamen Krone, in dem Bundesrecht nur mit Übereinstimmung aller Bundesglieder*

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[1] *Le Statut de l'État Libre d'Irlande.* (Paris : Rousseau, 1929.) Pp. 252. Price 25 fcs.

[2] Ansbach : C. Brügel & Sohn, pp. 102.

und mit Bindung nur für sie, nicht unmittelbar für die einzelnen Bürger auf im allgemeinen gewohnheits-rechtlichem Wege geschaffen wird; die Bundesglieder sind völkerrechts-unmittelbar" (p. 99). We may readily agree that the Dominions are States and subjects of international law, but it is impossible to accept the view (p. 92) that the Dominions decide for themselves as to peace and war in the sense that they can be at peace when the United Kingdom is at war. No authority is cited for that view, and it is quite impossible to compare with the position of a Dominion, which determined to remain neutral, that of the neutralized part of French Savoy in 1914 (p. 59), for that neutralization rested on international agreement, which has never been arrived at as regards the position of the Dominions, though it was suggested by a Victorian Royal Commission in 1870 for the colonies. The right of secession, however, is denied (pp. 22–4), and the dissertation contains a large amount of interesting matter and bears signs of a determined effort to grasp the actual working as opposed to the literal meaning of British political and constitutional declarations.

Though the fall of Mr. Bruce's Government has deprived Mr. Latham's new book,[1] which forms the John Murtagh Macrossan Lectures for 1928, of its official character it is of the greatest value as the expression of the views of an expert in the law of the Commonwealth on the measures necessary to give effect to the conclusions of the Imperial Conference of 1926. The work displays those qualities of directness, force and lucidity which are familiar from Mr. Latham's contributions to the debates of the Commonwealth Parliament. Much of his argument must command general assent, and it is only necessary to touch on one or two points regarding which there may be divergence of view. Mr. Latham is inclined to hold that wide use might be made of the Commonwealth power to deal with external affairs; it could, he holds (p. 55), be used to vary rights existing under State law. It may be so, but the power is very vague in comparison with the authority given to Canada, and there is as yet no judicial decision helping us to the wide conclusion reached by the author. But, as he points out (p. 57), the power is immediately and properly available to enable the Commonwealth to carry out, if and when it deems it necessary, its right to establish separate diplomatic representation overseas. The author seems (p. 90) to hold that it would be impossible to extinguish the prerogative right to hear appeals from Australia by a Commonwealth Act, though this might be accomplished by an amendment of the Constitution. It seems to me clear that an Act passed under the express power given by s. 74 of the Constitution, which has been enacted by the Imperial Parliament, would be valid and would extinguish the right to grant leave, though the action takes place outside Australia; in *Nadan* v. *R.*,[2] cited by Mr. Latham, the Judicial Committee was dealing with the Canadian

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[1] *Australia and the British Commonwealth.* (London: Macmillan, 1929.) Pp. xii + 149. Price 7*s.* 6*d.* net.

[2] [1926] A.C. 482.

Constitution, under which no power is given to take away the right of appeal, and the narrower interpretation placed on s. 74 by the author appears to me to nullify its effect. It is most interesting to find Mr. Latham upholding the validity of the Colonial Laws Validity Act, 1865, though he very properly suggests that, if it is maintained, it is desirable to define the meaning of repugnancy, and to restrict its operation to Acts expressly applying to the Dominions. Similarly Mr. Latham is not at all anxious to see the power of the Imperial Parliament destroyed; he naturally holds that such legislation, with Dominion concurrence, is a convenient and effective means of common Imperial action. On the question of the Governor-General's power to reserve Bills of the Commonwealth Parliament Mr. Latham's view (pp. 66 f.) is, I think, doubtful. The discretion assigned to the Governor-General is, he holds, to be exercised according to the normal principles of responsible government, which would mean now that no discretion was left to him at all. The discretion in the Commonwealth doubtless meant, when granted in 1900, not personal caprice, but consideration of the advice of ministers and the instructions he might receive from the Crown whose representative he is. Such control has not "long been abandoned in the case of the States of Australia"; there are even now permanent instructions forbidding assent to certain classes of Bills. Of course, in view of present relations, the Constitution in fact may well be interpreted as depriving the Governor-General of any voice, but that, it seems, was not, and is not, its legal interpretation. It is very doubtful also whether Mr. Latham's suggestion (p. 85) as to the form in which the limitation as to extraterritorial legislation should be relaxed is adequate; to provide by Imperial Act that a Dominion law should be valid, though it attached criminal consequences or civil consequences to acts done without the Dominion, would authorize the punishment if found in the Commonwealth of persons accused of hampering the floating of Australian loans on the London market or interfering with the sale of Australian products. Power should be limited to penalizing acts done overseas of Dominions citizens, *i.e.* of persons identified with the Dominion which legislates. Two small mistakes may be corrected; the first Imperial Conference met in 1911, not 1907 (p. 7); the Imperial Act which established the Constitution of the Irish Free State is 13 Geo. V, Sess. 2, c. 1, and the passage cited from it (p. 9) is really Article I of the Constitution confirmed by the Act, and not an independent expression of the view of the Imperial legislature.

A. Berriedale Keith.

THE EXTERRITORIALITY OF AMBASSADORS.

Even lawyers of whom Mr. Adair is so critical will welcome unreservedly the valuable collection of facts which he has accumulated regarding the status of Ambassadors and their staffs during the sixteenth and the first years of the seventeenth century.[1] The late Professor Oppenheim would certainly have been glad to see so valuable an outcome of a suggestion of research in the early history of International Law. Perhaps there is less positive value in the summary of the views of minor writers; where they cannot be shown to have influenced substantially the development of theory, or to have guided practice, it might be well to allow their works to pass into that oblivion to which we are all condemned in the long run. But we may heartily agree with Mr. Adair in doubting whether Gentili has not been accorded too much praise as a positivist (pp. 256 f.). There is, however, one doctrine in which it is impossible to follow Mr. Adair, namely his view (p. 88) that " Lord Mansfield's dictum in 1767 [2] that ' the law of nations is part of the common law of England ' is all nonsense so far as the seventeenth and eighteenth centuries are concerned." Mr. Adair asserts that prior to the Act of 7 Anne, c. 12, Ambassadors' privileges had not been *ipso facto* protected by the courts. He seems indeed to disbelieve Mansfield's definite assertion in *Triquet* v. *Bath* [3] that Lord Talbot had laid it down in *Barbuit's Case* [4] that the law of nations was part of the law of England, suggesting that the editor of Talbot's cases merely copied Mansfield. This cannot be proved, and it is surely impossible without a scintilla of evidence to throw doubt on the judicial assertion by a judge of what was decided in a case of which he had personal knowledge. It is perfectly legitimate to argue that Talbot and Mansfield alike erred, and that the learned judges who since have asserted the same doctrine are in equal error, but Mr. Adair's contentions are not convincing. To prove his case he should have adduced instances in which suits were brought against Ambassadors in the courts, where absence of jurisdiction was pleaded, and where it was disallowed. If such existed, doubtless he would have adduced them. But his actual argument (pp. 239 ff.) rests on the view (1) that Blackstone did not agree with Mansfield, which may be added to the many errors of that excellent writer, and (2) that the passing of 7 Anne, c. 12, proves that no protection was in fact given by the courts. That rests on a misunderstanding of the significance of the Act, which was passed to provide satisfaction to the Tsar for the arrest on civil process of his Ambassador, an insult for which the Tsar demanded the infliction of the death penalty. The demand could not, of course, be conceded, but the incident called attention to the difficulty under the existing rules of procedure. No suggestion was made that the Ambassador could not have obtained relief from the courts, but it was deemed desirable to deter claimants from attempting to employ the usual forms of proceeding, by threatening condign punishment, and the Act deliberately, as was pointed out to the Tsar, gave the judges a free hand' in penalizing any insult. This in no way proves that the persons who arrested the envoy were not liable at common law to punishment for the misdemeanour of arresting the Ambassador; the Privy Council obviously thought they were, for it had them tried in the Queen's Bench, and the failure to proceed to sentence is most probably explicable by the fact that the judges could not have imposed any penalty at all commensurate with the desires of the Tsar for vengeance. The ornamental character of the Act is sufficiently proved by the fact that its criminal provisions have remained a dead letter, and for civil purposes it is regularly treated by judges as merely confirming the common law. Certainly we cannot discredit Mansfield on the strength of the Act. Perhaps the whole matter really rests on a misunderstanding, for Mr. Adair argues (p. 241) that before 1709 violation of an Ambassador's immunities was not criminal, punishment being a matter for prerogative action and not a part of the common law. This seems hardly legitimate; the punishment inflicted by the Council in cases of violation of the rights of Ambassadors (*e.g.* on Fleetwood in 1576) was doubtless regarded by Mansfield as a vindication of a breach of the common law inflicted by the appropriate court; when the Council's own judicial activities were ended, then it naturally, as in the Russian case, set the court of Queen's Bench in motion. It may be added that, unless and until the courts hold that the Act of Anne has any application to criminal proceedings against Ambassadors, the better opinion seems to be that it has not, and that it is not desirable that the statute should be extended beyond its obvious intention.

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[1] *The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries.* (London: Longmans, 1929.) Pp. xii + 282. Price 21*s*. net.

[2] *Heathfield* v. *Chilton*, 4 Burr. 2015.

[3] 3 Burr. 1480.

[4] Cases *t*. Talbot 281.

A. BERRIEDALE KEITH.

LEGAL PHILOSOPHY.

IN the years since the war there has been something like a renaissance in legal philosophy among the French-speaking peoples. Examinations of ultimate principle like those of Ripert, Carré de Malberg, de Page, Bonnecase, are a wealth of critical analysis compared to which Great Britain has little of first-rate significance to show outside of Professor C. K. Allen's *Law in the Making*. This work [1] of Professor Dabin is an excellent introduction to the character of the modern debate. A little over-expansive, somewhat too given to refinements of detail without speculative importance, ignorant of Anglo-American work like that of Pollock and Pound, it is yet a most suggestive account of the considerations by which the French lawyer is seeking to reshape the foundations of his science.

M. Dabin's work will be found of special interest to English readers because the substance of his philosophy is broadly akin to that with which they are familiar. He might, indeed, not unreasonably be called a modified Austinian who is acutely aware that principles on the confines of law play an important part in shaping the motives of the law-maker. He will have none of M. Duguit's relentless attack upon the authority of the State. He is unmoved by the attempt of M. Geny to prove that concepts of natural law are the unescapable datum line from which the legal philosopher must invariably start. He rejects also Professor Kelsen's construction of a juristic science of pure concepts unrelated to the actual operation of legal institutions acting in the world we know. For him law is the pronouncement of an ultimate authority in a State which attains the common good by preserving social order and enriching its quality. The imperative element in law, the monarchical position of the State from which it emanates, are for him fundamental. Problems like those of consent, like the relation of law to justice, or of the agents of the State to the power they operate in its name, he removes altogether from the sphere of positive law. They belong, in his view, either to morals or to politics; they are no part of a scientific jurisprudence. From this angle of approach, Professor Dabin is able to criticize with great effectiveness Duguit's theory of social solidarity as that which gives to law its necessary contours, and to denounce Geny's irreducible minimum of natural law on the ground that it remains vague and unsubstantial. He demonstrates once again how powerful an instrument of analysis the Austinian theory is, once it is used as a criterion for attack upon other systems, and once its exponent is satisfied not to examine its own assumptions.

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[1] *La Philosophie de l'Ordre juridique Positif.* By Jean Dabin. (Paris: Librairie Sirey.) Price 60 frs.

Professor Dabin, however, is not only a modified Austinian; he is also a Roman Catholic painfully conscious that the State is but a temporal instrument with very limited objectives. It is interesting to note how this attitude compels him to set out alongside his legal theory of the State a sketch, notably well done in his analysis of the right to resistance, of a philosophy of the State which is beyond the realm of law. Here he is concerned with what may be termed a metajurisprudence, the relations of which with positive law he is not able to define with any effective clarity. The fact is that no Austinian theory can ever produce an adequate philosophy of the State, just because, ignoring the need for a system of values, it reduced itself to a formal logic which contains only so much as can be deduced from its original axioms; and these begin by an arbitrary refusal to face as law anything save that which can be analysed in terms of its narrow definitions. The Austinian in Professor Dabin sees the looseness of texture (rather like life itself) in Geny and Duguit, and is horrified by it; the Catholic in him appreciates the effort to relate law to morals and tries regretfully to face the fact that they must always dwell in ultimately separate realms. Brave as is Professor Dabin's effort, I do not think he really succeeds in overcoming the difficulties of his own approach. Law cannot permanently divorce itself from the effort to grapple with the problem of justice merely by making definitions from which the idea of justice is excluded. What may be called institutional systems of law, like his, explain how a legal nexus works once it is in operation; but they do not explain, the sanction of force apart, why men conceive themselves as bound by the claims of law to obedience.

H. J. L.

THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW.[1]

The question of State responsibility has in the last ten years been dealt with in a number of monographs, mainly as a problem of choice between the principle of State responsibility as based on fault and that of absolute responsibility. The classical doctrine of the founder of international law, who based the responsibility of States on fault, was vigorously attacked by positivist writers at the beginning of this century. In the last ten years, however, there has taken place a wide acceptance of the view that the principle expressed in the Roman law conception of *culpa* must, as a broad rule and in conformity with other systems of law, form the basis of state responsibility. In special circumstances this rule may indeed give way to the more mechanical principle embodied in the rule of *Rylands* v. *Fletcher*, but on the whole the practice of States and of international tribunals may correctly be summarized as adhering to the requirement of fault as to the basic principle of State responsibility. Professor Eagleton is reluctant to recognize the applicability of this principle. He does not, however, supply any evidence in support of the contention that " the responsibility of States in international law is essentially different from that of individuals under private law (p. 3, *n.* 1). On the contrary, the very first paragraph of this monograph is devoted to showing that responsibility in international law is the result of much the same forces as operate in any legal community. In Professor Eagleton's words, " it derives its authority from the same moral sense of obligation which influences mankind anywhere " (p. 5). The machinery of enforcement of international duties may be different from that in private law, but it is a mistake to confuse the procedure with the principle. In his conclusions, the author seems to be willing to admit that the responsibility of the State coincides with its duty " to use a proper diligence in preventing acts of individuals or in redressing them," and that " the lack of such diligence may perhaps be regarded as fault " (p. 213), but he is prepared to jettison this result on the ground that " it is the employment of such private law concepts as this which has produced so much confusion as to responsibility in international law " (*ibid.*).

Strangely, although fortunately, Professor Eagleton has left the exposition of his views on this subject to the concluding chapter of the monograph, which is otherwise a most useful and judicious exposition of the practice of States and international tribunals. In the second chapter he discusses with thoroughness the subject of State responsibility, including federal States and States of different degrees of dependency. His discussion, in the third chapter, of the responsibility of the State for acts of its agents is instructive, and the results reached are sound, in particular in regard to responsibility for acts of organs acting outside their authority and in regard to denial of justice. In the following chapter, which deals with acts of individuals, the statement that " a State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction " is certainly too wide and requires qualification. In any case, it does not in any way formulate the practice of the United States, which do not punish revolutionary preparations against foreign States except those which amount to interference or overt attempts at interference by organized acts of force usually referred to as hostile expeditions. It is not believed that the practice of the United States is in this respect contrary to its international duty. There follow chapters on exhaustion of legal remedies and the Calvo Doctrine, on riots and civil wars, on contractual claims. and on the measure of reparation. In the latter, the question of award of interest is treated rather hurriedly.

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[1] *The Responsibility of States in International Law.* By Clyde Eagleton. (The New York University Press, 1928.) Pp. xxiv + 291. Price $6.

The monograph is a conscientious piece of research and a mine, at times too rich, of case law on the subject. It will prove of great help to the student and the practitioner. We have little doubt that at the forthcoming International Conference on the Codification of International Law, which is due to assemble in March 1930, and at which one of the three subjects to be discussed will be that on responsibility of States for damage caused in their territory to the person or property of foreigners, Professor Eagleton's book will be resorted to as a welcome instrument of work.

H. L.

CODIFICATION OF INTERNATIONAL LAW.

THE publication of these three substantial volumes[1] marks a definite stage in the work of the Committee of Experts appointed by the League to study the possibility of codifying certain branches of international law. Perhaps it is too much to hope that they may be pondered by those amateur internationalists who talk so glibly about codification as if it were a mere problem of draftsmanship. At any rate, ignorance of the difficulties of the problem is no longer excusable. Unfortunately, this does not mean that it will no longer persist.

The three subjects treated are nationality, territorial waters, and the responsibility of States for damage caused in their territory to the persons and property of foreigners. In each case the Preparatory Committee has drawn up a schedule of points as a " base of discussion," and the three volumes are chiefly occupied with the observations of those Governments which have found it possible to present their views within the time available.[1] Less than thirty Governments have replied to each of the questionnaires, Spain, Brazil and the Argentine Republic being the most important Powers which have made no contribution to the discussion. Chile is the only state of South or Central America to submit any comments. Furthermore, some of the replies are purely formal. New Zealand and India identify themselves with the attitude of the British Government upon every point. The Irish Free State affirms her fervent belief in codification, but pleads that her limited experience does not yet permit her to offer any practical suggestions. Upon the subjects of territorial waters and responsibility Siam merely states that she wishes to reserve her opinion. Italy replies to each point raised, but with a brevity that verges upon brusqueness. Bulgaria dismisses the problem of territorial waters in fifteen lines, and does not even say whether she accepts the three-mile or any other limit.

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[1] *Conference for the Codification of International Law.* Three vols. Vol. I—*Nationality.* Vol. II—*Territorial Waters.* Vol. III—*Responsibility of States.* (League of Nations Publications Department, Geneva.)

On the other hand, many of the replies have been drawn up with a care and scholarship which make them really valuable contributions to the scientific study of international law. Even if no actual codification results, the work of the Committee will have justified itself in that, for the first time, it has collected the carefully considered opinions of the chief Governments of the world upon the three subjects treated in these volumes. No private writer could ever have achieved this result, and this collation of various views is obviously the first step towards reaching that measure of agreement upon which any codification must rest. From the point of view of the student the importance of such a publication needs no argument, and to-day there is probably no publicist so wedded to *a priori* conceptions that he will venture to ignore this weighty presentment of the doctrine and practice of the leading States.

Within the limits of a review it is clearly impossible to comment upon more than a few points of major interest. There is a general agreement upon the principle that nationality laws must remain a matter of domestic jurisdiction, and a few Governments refuse to recognize any qualification of this principle. The majority, however, are prepared to recognize such limitations as follow from the opinion of the Permanent Court in the Tunis case, relying upon special agreements to solve the inevitable cases of conflict. It is interesting to note that the law of the Soviet Russia " does not recognize any such category as ' illegitimate ' children."

Upon the question of territorial waters there is general agreement that these are subject to State sovereignty, and that this sovereignty extends to the air above. The necessary qualifications of this principle disclose some differences of opinion. A strong majority supports the general rule of the three-mile limit, with extensions in particular cases resting upon special agreement. Among the greater Powers, Italy demands " six miles, and special rights for a further six miles," while

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[1] A few replies which arrived late have been printed as supplementary papers.

Soviet Russia still maintains the old Russian claim to twelve. Norway and Sweden put forward strong historical and geographical reasons for the admission of their special claims, but Portugal is not likely to get much support for her solitary demand for eighteen miles.

Turning to the question of responsibility, we find that the first "point" proposed by the Committee raises an issue of fundamental importance by definitely claiming the subordination of municipal to international law. For the most part this principle is accepted, but there are certain exceptions, the reasons for which can probably be found in current international controversies. Thus Rumania says: "We cannot admit absolutely the principle set out in paragraph 1 . . ., which presupposes the existence of an international law on a higher plane than the constitution and internal laws of the various States." In particular she refuses to admit that foreigners, unless specially protected by treaty, can ever have higher rights than nationals. It need hardly be added that the Hungarian reply upon this point reflects a different view. The position taken by Poland and Czechoslovakia would seem to be practically the same as that of Rumania. Chile also declines to admit any special rights of foreigners, and follows the traditional South American doctrine in claiming a general finality for the decisions of municipal courts.

One rises from the perusal of these volumes with the general impression that the task of codification is going to be extremely difficult, since the differences here disclosed relate as much to the substance as to the form of international law. At the same time, it is satisfactory to know that the problem is at last being approached along the right lines. A clear statement of differences is the first step towards agreement.

H. A. S.

PRIVATE INTERNATIONAL LAW.

The first volume of this admirable work[1] was reviewed by the Editor in a previous volume of this *Journal*.[2] The second volume deals with persons, property, juridical acts, and obligations.

M. Arminjon quite rightly eschews the doctrinaire and *a priori* methods which have found favour with too many Continental writers. Indeed, the chief difficulty with "private international law" is that it is not in any real sense international at all. That is to say, its rules do not rest upon any kind of international agreement, express or implied, but are wholly determined by municipal considerations, and therefore form one chapter of the private law of each country concerned. Even where they deal with matters of genuinely international importance, as in the case of the rules determining nationality, it has not yet proved possible to arrive at anything like uniformity. In these circumstances the writing of a general treatise on the whole subject can be of no practical value, and attempts to achieve this end merely result, as the learned author points out, in theoretical essays arguing what the law ought to be, not what it actually is. M. Arminjon gives practical value to his treatise by planting himself firmly *dans le cadre de droit français*, though at the same time he has evidently studied with care the standard treatises upon the law of other countries.

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[1] *Précis de Droit International Privé*, by P. Arminjon. Vol. ii. (Paris: Librairie Dalloz.) Pp. 489. 50 francs.

[2] Third Series, vol. ix, pt. iv, p. 279.

To the English reader one of the most interesting chapters will be that in which the author discusses the relative claims of nationality and of domicile as the test of personal status. The arguments in favour of each system are summed up lucidly and fairly. In Anglo-American law the complexity of legal jurisdictions within a single political allegiance would alone be sufficient to compel the adoption of domicile as the test of status. Even in those countries, such as France, which have adopted the rule of nationality as the general principle, it has been found necessary to admit important exceptions of various kinds to meet the problems created by colonial possessions and by distinct bodies of religious law preserved within the general framework of the State. In truth, neither nationality nor domicile is sufficient as an absolute rule. In each case circumstances compel a further reference to other standards.

At p. 48 the learned author ventures into the deep waters of definition, and offers a definition of "property" (*biens*) in the following terms: *Une substance matérielle ou non, susceptible d'être appropriée, c'est-à-dire de procurer une jouissance sans l'intervention d'une personne determinée.* It may perhaps be suggested that this formula is as likely to raise difficulties as to solve them. The word "substance" is in itself a copious fount of controversy, and the definition does not seem to assist the practical lawyer in his real difficulty, which is to draw the line between proprietary and contractual rights. Perhaps, after all, the line does not really exist.

It need hardly be added that the interest of most readers will not be exhausted by the two or three matters to which allusion has been made. The whole book is well worthy of the careful attention of all students of comparative law. H. A. S.

INTERNATIONAL ECONOMIC RELATIONS.[1]

Problems of international economic relations are of increasing interest for the international lawyer mainly for two reasons. They are an important instance of the possibilities of the gradual extension of the sphere of international law and one of the main factors to be considered in connexion with the pacific settlement of international disputes. The obligations undertaken in Article 23 of the Covenant of the League of Nations to secure and maintain equitable treatment for the commerce of all members of the League, show that the founders of what will one day become the organized community of nations were fully conscious of the importance of the problem. It has become a trite theme that an international law which ignores the necessity of a legal treatment and regulation of such economic questions of an international character like tariffs, freedom of migration and accessibility to raw materials is unreal to a considerable degree, and that so are any schemes to avoid war if they dispose of this problem merely by referring to the exclusiveness of domestic jurisdiction. On the other hand, not much constructive help can be derived from merely exposing the weakness of these extreme claims of State independence and of the reserved domain of matters of domestic jurisdiction. For after all has been said about the absurdities of such claims and their incompatibility with modern conditions, the fact remains that it is the main task of international law to secure for States a measure of freedom compatible with the exigencies of common international life. When an effective international legislation becomes a reality, how far shall we be able to go in restricting the freedom of States in matters affecting their economic life and relations ?

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[1] *International Economic Relations: A Treatise on World Economy and World Politics.* By John Donaldson. (London: Longmans, Green & Co., 1928.) Pp. xxx + 674. Price 16*s*. net.

Professor Donaldson's comprehensive treatise constitutes a learned and weighty attempt to supply the data for the consideration of these questions. The author, who is Professor of Commerce at the George Washington University, is no doubt qualified to tackle a task of these dimensions. He was economic advisor to the United States War Trade Board and to the United States Shipping Board, technical advisor to the American Delegation to the Washington Conference on the Limitation of Armaments, and Editor of the *Commerce Yearbook for Foreign Countries* of the United States Department of Commerce. These associations explain partly the author's general attitude of caution and moderation as to the possibilities of international action. He is first to recognize an established and growing world economy. But within this world economy, he says, " there must be observed national economies, or units of partly distinct character, which are sufficiently diverse to bear a complementary relation to one another and thus to afford the most logical basis for a world economic organization ; this world order is less like a pool of water than a universe of stellar systems, each revolving in its own course, but with definite relations to the others " (p. 594). This explains, for instance, his attitude on the question of freedom of and restrictions upon immigration. He is apt to regard the demand for outlets for congested population as containing " a degree of hollowness " and to see the fundamental remedy in restriction upon the increase of population in congested areas. We doubt whether this view ought to be regarded merely as a partisan exposition of selfish national policy.

The treatise opens with a consideration of the basic and related factors in national and world economy. The author discusses here the geographical factor, problems of race and population, the political factor in its evolution from independent domestic economy to world economy, and the legal and territorial factors. He then deals with the relation between national and world economy, and, in particular, with foreign enterprise and world trusts, with particular reference to special regions like Turkey and China. There follows a detailed account of the problem of national resources and the interdependence of nations for essential materials. The author discusses here public, foreign and international, control of new materials and the question of world monopoly of essential supplies, in particular of oil. He then considers private, foreign and international, exploitation of raw materials. The work concludes with a general discussion of world economy in its relation to world politics.

Professor Donaldson's treatise is a useful and important contribution to the science of international relations. Although it will primarily appeal to the economist, the lawyer interested in the growth and the possibilities of a further development of international law will read it with profit and pleasure. And as the study of the pacific settlement of international disputes must be altogether incomplete without sufficient attention being paid to the economic sources of friction between States, the student of this aspect of international relations will, notwithstanding Professor Donaldson's cautious conclusions, find his work stimulating and instructive. H. L.

THE CONFLICT OF LAWS IN TIME.

Article 2 of the *Code Civil* negatives the retroactivity of laws, but it leaves it to jurisprudence to define the exact import of that rule of interpretation. Nor does the express mention of this exception to the general rule of the immediate operation of legislation absolutely negative the possibility of the existence of other exceptions. In Article 3 certain exceptions of the application of French law are admitted in deference to the claims of foreign law, but these are not deemed exhaustive. There is, therefore, left open a wide field for juristic activity both in determining when the legislator is silent, how far the new law is to be made immediately effective, and in indicating the principles on which legislation should proceed when it is deemed wise to define precisely the application of fresh enactments. These topics, with others incidental, give ample scope to the analytical and critical acumen of Professor Paul Roubier of Lyon in the first volume of his treatise on *Les Conflits de Lois dans le Temps*.[1] He insists that the subject cannot effectively be solved by the mere application of the principles of private international law (pp. 48 ff.), and that may be readily conceded; between conflicts in space and time there are inevitable divergences, though the analogies are more striking than M. Roubier is prepared to admit. The maxims *locus regit actum* and *tempus regit actum* present similar ambiguities: in a contract is the *locus* that of the place of making the contract, or that of its execution? Is the time that of the agreement or the period when it is to be carried out? Merlin de Douai drew an effective comparison between the two systems on the head of capacity; a married woman's capacity might change with change of domicile, just as it might be altered by change of law. M. Roubier objects that under modern views of international law changes of location have no effect as the law of nationality prevails, but this argument has no cogency for any system of private international law which accepts domicile as regulating capacity. It is, however, true that the motives for decisions as to the applicability of a foreign law or of an earlier law are essentially different, the latter resting on considerations of internal policy, the former largely on regard for rights acquired under foreign laws, and the analogies of the systems are not conclusive. Hence it is perfectly justifiable to refuse to accept as adequate the doctrine that laws should not derogate from acquired rights as a guide in solving conflicts of law in time. There is a great gulf between the considerations affecting the recognition which jurisprudence should accord to a right duly acquired under a foreign system of laws, and to a right existing under the legal system of the country itself. M. Roubier's own contribution to the theory consists essentially in the analysis of a *situation juridique* into two elements, the dynamic phase, corresponding to the moment of constitution or extinction, and the effects which form the static phase. No law which seeks to regulate the conditions of the constitution of a juridical situation can take into account facts anterior to it, unless it is given retroactive effect. On the other hand, a law dealing with the effects of a juridical situation can, without retroactivity, deal with all the effects of the situation after its coming into operation. This analysis, it may be admitted, is not without difficulties in application to any set of facts, and the conclusion is inevitable that the legislator should realize more completely than he has in the past the absolute necessity of paying as much attention to the question of provision for the period of change from an old law to a new as to the enactment of the fresh legislation. M. Roubier wisely refrains (pp. 510 ff.) from any wholesale condemnation of retroactive legislation, combating effectively Professor Duguit's theory that any act which is retroactive is essentially void as contrary to law and may be properly disobeyed; he insists also that it would be impossible in France to create a system which would permit a court to pronounce any act of the legislature invalid; his judgment is doubtless sound on political grounds, but it can hardly be admitted that a rigid constitution protected by a court is possible only under a federal system, though doubtless such a system presents by far the most effective means of securing power for the judiciary to annul legislation. Interesting discussions of the treatment of current contracts (pp. 574 ff.), and the principles which should be borne in mind in retroactive legislation (pp. 634 ff.) complete the volume, which is confined to private law. The continuation of the work will unquestionably be of very considerable interest and value.

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[1] *Les Conflits de Lois dans le Temps.* (Paris: Recueil Sirey, 1929.) Pp. vii + 675. Price 60 fr.

A. Berriedale Keith.

GERMAN CONSTITUTIONAL LAW.[1]

THE German Constitution of 1919 has already given rise to a voluminous literature, and in its own home every clause has already been the subject of extensive scientific and polemical commentary. Nothing, so far, of the classic stature and significance of *The Federalist* has appeared, probably because the German National Assembly operated publicly in the centre of an abnormally interested electorate, linked to it by means of well-organized political parties, while the fathers of the American Constitution did their work in the strictest secrecy, and thus needed a justification after the fact. But if no such vindication as *The Federalist* has appeared, numerous are the examinations of the intentions of the constitution. For nothing is truer than this in political science, that no written constitution can live and function without daily inspiration from the environment it is intended to serve. There are already certain works which have acquired a high reputation, and among them are those by Anschütz, Giese, Poetzsch, Hatschek, Stier-Somlo. But they are not adequately spacious, and consequently cannot do full justice either to differences of opinion among jurists or to the political considerations which exist side by side with positive law and give this so different a meaning in actual practice, which, perforce, comes to be deemed constitutional. As those who make it their business to master the extremely important outflow of German works on constitutional theory and practice cannot fail to be aware, an unfortunate characteristic of this has been its narrow legal formalism. This was a veritable affliction from 1866, when the North German Confederation raised the twin questions of federalism and sovereignty, until recent years, when the rise of historical and sociological schools under men like Schmoller, Max Weber, Salomon, Gumplowicz and Franz Oppenheimer, and the teaching of men like Gierke, Preusz, Ehrlich, Stammler and Jellinek, began to irrigate the vast desert of positive law. The new outlook, that constitutional law is properly explicable by scientific analysis of the social and economic elements which went to its making, and of the needs it was to serve, is well represented in this new and larger commentary, *Das Handbuch des Deutschen Staatsrechts.*

Its time is opportune, for a decade has already passed since the State which it describes was established amidst revolution, international threats and pains and political scepticism. Ten years have brought some alleviation of these things, and tested the veracity and practicability of the main institutions. It is certainly too early even yet to speak of an ultimate reckoning. Who in 1885 could have guessed what the French Constitution would be to-day? And who, again, could at any point in American or English history have done more than describe a moment in time? Yet if, in constitutional matters, it is safer to be an historian (even though dead men do tell tales) than a prophet, it is never too early to make an estimate of established institutions. And the interest of it, in the matter of the German Constitution, may satisfy the most eager student of comparative law, for it is of all constitutions the most elaborate established in a democratic State, with the conscious application of the most modern conclusions of political, constitutional, social and economic science. What will it do? How will it work? What will society do to it? How far will its intentions be actually fulfilled? To answer these questions one must begin with the present work.

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[1] *Handbuch des Deutschen Staatsrechts.* Gerhard Anschütz and Richard Thoma. Parts 1–5. (Tübingen: J. C. B. Mohr, 1929.)

It is the kind of handbook at which the Germans are extraordinarily good: a collective work, capably planned by recognized authorities (in this case Professor Gerhard Anschütz of Heidelberg and Professor Richard Thoma of Bonn), and elaborated by the editors and a body of academic colleagues from all the universities, distinguished for their eminence in the world of political, administrative science, and at once specialists and men of broad culture. It is not a mere encyclopædia of independent articles, but a well-integrated co-operative treatise, in which the general discussions and the particularities are nicely proportioned.

It is impossible for me to give a critical account of each contribution, for even in these first five instalments, which comprise only about one-sixth of the total projected work, a very wide and controversial field is covered. All I shall do is to set down in English the contents and the authors, and at some points comment upon the nature and value of a particular contribution.

Instalment One contains an Introduction by Professor Thoma, a sketch of German constitutional history by Professor Anschütz, a description of the German Confederation of 1815 by Professor Godthard Josef Ebers, a recognized authority upon the history of federal theory and institutions, and an account of the movements towards unity in 1848–1863. Thoma's introduction discusses the nature of constitutional law and its study, and that distinction which is so familiar to the Continent, but not to Englishmen, between public and private law. He asserts—in our opinion quite rightly—the impossibility of any fruitful jurisprudence which attempts to teach and explain the law without reference to its environment, of which political phenomena are an important element. German jurists, under the influence of Max von Seydel and Laband, have been extraordinarily shy of political explanations, because they believed that it was impossible to be really scientific in one's explorations, the bias always existing, sometimes consciously. Hence they omitted it altogether, with what dire results the works of the positive school amply show. Indeed, as Thoma rightly observes, this very attitude implied a judgment of political values; and the school lost all interest in the dynamics of constitutional life. It is to be hoped that Thoma's view has given the proper tone to all the contributions yet to come, and certainly the names of the contributors, people like Meinecke, Schücking, Koellreutter, Bilfinger, Walther Jellinek and Erich Kaufmann vouch for that. Thoma very lightly, but suggestively, indicates the particular tendencies which now prevail in Germany touching the study of the law. A great change has undoubtedly come with the Revolution, and the theorists who unconsciously contributed to its preparation: for the avenues of inquiry in constitutional matters in a *Volksstaat* are clearly different from those in an *Obrigkeitsstaat*. In the latter law is given by a few, and its commands imposed, in the former law is made by a multitude of constituents and accepted, broadly, only while it fits the case; hence the need for inquiry into sources and impulses, and hence the close identification of constitution and political activity.

Anschütz gives a very able account of the rise and fall of the great monstrosity, the Holy Roman Empire, and the consequent growth of that State particularism which prevented, and even to-day still prevents, the evolution of a unitary State. This section is particularly interesting as a study in the genesis of States: I mean of the individual States of the Federation, showing their progress from princely property to political commonwealths.

Instalment Two contains an account of the Constitutional Development in the German States, by Geheimrat Professor Dr. W. von Calker of Freiburg; of the North German Confederation and its expansion into the Empire of 1871 by Anschütz. Then follow the broad principles of constitutional law in the Empire by Thoma, and of the individual states by Dr. Hans Gmellin of Giessen. All these are, of course, very ably done, especially the account of the Imperial Constitution, for this is a judgment founded upon a retrospect, all or almost all of the material now being available, especially after the various works on German Federation by Heinrich Triepel, and the disclosures before the Investigation Commission of the Reichstag. I have no space to deal with the subject here, but I can say, for my own independent studies here check Thoma's account, that the English student will be amazed at the difference between orthodox accounts of the German Constitution and what we know now. And to know this is to have an insight into the universal conditions of federalism. This Thoma gives. Of an interest, however, as great as this, is the article by Walther Schücking on Reform during the War. He shows the growing dissension in Germany between the old State and the social forces, conscious now of their strength.

Instalment Three.—This subject is dealt with on a broader scale, and by the hand of the great historian, Friedrich Meinecke, well known to everybody as the author of *Weltbürgertum und Nationalstaat* and *Die Idee der Staatsräsen*. This is the best short account I have so far seen of all the primary and secondary forces which produced the German Revolution. Then follow articles by Walther Jellinek on the National Assembly and its Work, and the Rise and Establishment of the Weimar

Constitution. Both are extremely good, as was to be expected of one who has already produced fairly large-scale studies on that subject in the *Jahrbuch des öffentlichen Rechts.* Jellinek has used manuscript material which is not yet available generally, so that, even apart from his own aptitude, which is of a high quality, the articles are important. Then, Koellreutter, one of the first Continental writers to point out to Englishmen that they possessed a large body of administrative law and jurisdiction, discusses the evolution of the constitutions of the States.

Instalment Four.—This includes the history of Austrian constitutional development since 1918, by Professor Hans Kelsen of Vienna, who has had more to do with that history than he says, and two articles by Thoma, "The *Reich* as a Federation" and "The *Reich* as a Democracy." It must suffice if I give only the leading idea of the latter articles. Thoma is a unitarist, but he recognizes that in spite of the enormous increase of the unitary element in the Federation, one is still obliged by the facts to talk of a federal State. Although he would like to consign the usual juristic disputes about the nature of the Federation to the fields of political science, he realizes that that can hardly be done by the jurist, for "neither politically, nor juridically is it unimportant whether the constitutional jurisprudence of Germany describes the *Reich* as a federal State or as a unitary State, or whether it ascribes or denies a state quality, or sovereignty in even any sense, to the *Länder.*" But, he says, neither logic nor construction can decide this: nothing but "impathy" (*Einfühlung*). So he believes it to be right not to deny recognition as State to the *Länder*, and therewith the vitalizing and obligational conceptions of status and responsibility which the idea of a State comprehends. It must be admitted also that such ideas do still exist in the *Länder*, and that there are large obstacles to the increase of the *Reich's* competence. More, to deny the existence of the *Länder* as States is to assert that the *Reich* is all: but to assert that the *Reich* is all is to awaken an opposition to its ever becoming all. On the other hand, at all costs must one avoid so defining sovereignty as to conjure up again the sense of state particularism! Here Thoma enters upon an account of sovereignty, and its use in connexion with the word "State," including that the *Länder* must be dealt with as non-sovereign States. I am happy to see that Thoma does not take the bit between his teeth and run wildly over some exaggerated conception of sovereignty (a sheer waste of time and source of confusion), nor does he attempt to fit his facts into words which are by their nature so general as to enable any one jurist to crack another's definitions into unmendable parts. It is permissible to use "Federal State," or *Bundesstaat*, because there is no more convenient word, but not because it exactly characterizes the German *Reich.* Then the author sketches the institutional nature of this relationship.

In his article on Democracy Thoma insists upon the variety of meanings this word possesses, and particularly emphasizes the difference between a Radical and a Liberal democracy. He puts the German system under the second rubric, and shows how its various elements, its "checks and balances," the parliament, the state council, the president, the courts, the electoral system of Proportional Representation, the initiative and the referendum, the elaborate Charter of Fundamental Rights and Duties and local self-government are calculated to produce a balanced and temperate government.

In the *Fifth Instalment* are articles on the Symbols of the State and the Defence of the Republic by Professor Alexander Graf zu Dohna of Bonn, on the International Status of the *Reich* and the *Länder* by Professor Max Fleischmann of Halle, on Territory and Territorial Sovereignty by Professor Friedrich Giese of Frankfurt, and, by the same, the Legal Forms of Territorial Changes. All these articles are of first-class importance, especially those by Fleischmann and Giese, and capably done. But to these we will give more attention on the occasion of the next review.

This work should be acquired currently by all libraries (the instalments appear monthly), as it is and will long remain the standard treatise on the German Constitution. The contributors deserve very great gratitude for their ample references and bibliography. These are invaluable. May I address two pleas to the Editors and the publishers? The first I am certain will be granted, namely, that *special* care be taken with the index when the enterprise is completed. The second is this: As works of this kind are of international importance, and in the interests of professorial longevity, cannot the Latin and not the Gothic type be used? It is already used in the *Jahrbuch des öffentlichen Rechts* and many other scientific publications. The Gothic print is beautiful, but it damns the eyes. We professors are not short-sighted, and our eyes are our only fortune. Must they be prematurely ruined? On my bended knees I plead the cause of all readers of German treatises.

HERMAN FINER.

THE JEWISH LAW OF THEFT.

IN a significant introduction to this doctorate thesis,[1] Dr. Jung indicates "the historic distinctiveness" of Jewish law. Successively coming into contact with the codes of Babylonia, the laws of the Hittites, the Egyptians, of the Assyrians and the Persians, with Greek and Roman law, and in medieval and modern times with the Mohammedan law and the legal systems of Europe, the Jews could not help but be influenced by foreign laws. But the "rejections are perhaps more characteristic than the accretions." Institutions such as the exposure of deformed children and aliens restrictions—which were contrary to the ethical principles of the Jewish primal code, the *Torah*—were not adopted. In the second century A.D. a Jewish teacher advocated the abolition of the death penalty.

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[1] *The Jewish Law of Theft.* With comparative references to Roman and English Law. By Moses Jung, LL.B., Ph.D., Philadelphia. (The Dropsie College for Hebrew and Cognate Learning, 1929.) Pp. 145. Price $2.

The comparative law of theft, therefore, reveals resemblances and dissimilarities. *Furtum* is any fraudulent dealing for gain ; larceny implies a trespass, a change of possession ; *genebah* denotes the secret taking of a moveable. The *ganab* (or thief) must acquire possession by a mode of legal acquisition, *kinyan*. A bailee in Jewish law has possession, which, however, if bulk is broken, becomes unlawful. The *ganab* is liable to *kefel*, or double the value of the article stolen. Theft is a wrong against both the individual and society. The thief compensates the owner, and in addition pays punitive damages. If he could not pay he was sold. But this was not into slavery, but a sale, under the supervision of the court, of the thief's time and work for a period not exceeding six years until he had worked off the principal. Prisoners often complain, and with reason : How can they, as convicts, begin life afresh ? On release the *ganab* must be equipped with a necessary minimum to restart life. Again the rule of market overt, unknown in Roman law, is found in Jewish law. In larceny and *genebah* it is irrelevant whether the act is done for gain ; *lucri causa* is an integral part of *furtum*. An attempt was not a crime. *Kawwanah*—a more complex *mens rea*—is required to prove *genebah*. This is " the intention coupled with the desire to do a certain act, knowing the consequences of the act to be illegal and punishable." Surely impossible to prove ! But *Hatra-ah* comes to aid, or " forewarning " whereby the accused has previously been warned by two witnesses that he is about to do wrong. In the third century the rule was propounded that *dina demalkuta dina*—" the law of the State is full law." " The law of the land superseded the Jewish law as to all political and civil rights " (p. 73). An important " Ordinance of the Market " provided that where the buyer acted in good faith in open market, he must return the article to the owner, but is recouped the price. The Ordinance did not apply where the goods had been obtained from a notorious thief.

Dr. Jung's work is a lucid, systematic statement of the law and the sources, biblical and Talmudic. It is not, however (in our opinion), a profound piece of historical research. His English and Roman references—useful as a guide—are superficial and often incorrect. The book betrays a reliance on out-of-date editions and a lack of careful revision. Williams' *Personal Property* has passed beyond 1913 (the seventeenth edition), into the eighteenth edition, 1926 (p. 32). The case of *Regina* v. *Hassall* is cited as *Regina* v. *Hassel* (p. 37). " The subtle influence, he says, " which Roman law had been exercising on the development of English law was finally thwarted by the legislation of Edward I " (p. 11, *n*. 3 ; p. 44). If he had referred to Scrutton's essay on the Roman law influence (1885), or Maitland's brilliant Rede Lecture for 1901[1] on *English Law in the Renaissance*, Dr. Jung would have seen that the influence of Roman law was not thwarted as finally as he imagines. Odgers on the *Common Law* has reached a third edition, 1927 (p. 47). Dr. Jung—who quotes most of his criminal law and cases from Kenny's *Outlines*—should surely know that there have been editions of that delightful book since 1916 (the latest being in 1929). *Clayton* v. *Levy* is an unpardonable error for *Clayton* v. *le Roy* (p. 97). And there is a strange inversion of reference in "*Hargrave* v. *Spink*, K.B. 25 (1829)" (*ibid.*). The case is reported in [1892] 1 Q.B. 25.

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[1] *Select Essays in Anglo-American Legal History*, vol. i, pp. 168–248. (Cambridge, 1907.)

The terms "personal" and "real" estate are not applicable to Jewish law (p. 117). The distinction there is between moveables (*Metaltelin*) and immoveables (*karkaot*). Coke would have blenched at the style of *L.J.* (p. 133). To say that "Hearsay evidence was excluded in Roman law and is inadmissible in English law" (p. 135) is distinctly misleading. Dr. Jung might have found some valuable historial material in Holdsworth's *History of English Law* or Stephen's *History of the Criminal Law of England*—neither of which is quoted.

The Notes on Diligence and Possession are fragmentary. There is no reference to Poste, Moyle or Buckland on *cura*; none to Holmes or Pollock and Wright on Possession.

The book is a dogmatic statement rather than an historical exposition. We should like to have been told how the conception of theft developed from the days of the *Torah* (*circa* 1400 B.C.) to the time of *Mishnah* and the *Talmud* (A.D. 500). What was the mutual influence of *furtum* on *genebah*?

Again, the author fails to explain that there are two distinct compilations of the *Talmud*, the Jerusalem and the Babylonian *Talmud*. The former must not be disregarded as a source, and its views should be compared with those of the latter.

A bibliography of the numerous works quoted would have been very welcome; indeed, Dr. Jung's reading in Jewish law is very wide. His book (despite all defects) will be of great use to the scholar of comparative law who would pursue the wealth of reference; and if a positive statement of the law is desired, here will it be found.

GEORGE J. WEBBER.

THE LEGAL PROFESSION THROUGHOUT THE WORLD.[1]

THIS volume is dedicated to the German *Anwaltschaft* and the *Anwaltverein*—a body equivalent to a Bar association composed of both barristers and solicitors—in commemoration of the fiftieth anniversary of "free advocacy" in Germany, about which a word will be said later. It is a description of the legal profession as it exists to-day in all the principal countries of the world, and it is based on a *questionnaire* which has made

[1] *Die Rechtsanwaltschaft.* By Justizrat Dr. Julius Magnus. (Leipzig: W. Moeser, 1929.) Pp. xii + 536.

the *tour du monde*. Some of the correspondents have let themselves go more freely than others in dealing with their Bar and its problems, but this only adds to the variety and interest of the work.

The section relating to Great Britain and Northern Ireland is by Mr. R. E. L. Vaughan Williams, K.C., and Mr. Ralph Sutton, and that concerning the British Dominions and Colonies is by Mr. Everard Dickson, Barrister-at-Law.

We are conscious of no bias against Siam or Paraguay, but we venture to suggest that the Scottish Faculty of Advocates and the other legal bodies in Scotland are as much entitled to a place in the sun as the Bar of these countries.

Besides the descriptive reports, there are separate chapters on the legal profession in ancient Rome, on the history of the profession in Germany, and on the advisability of creating a body of international lawyers specially qualified to advise and assist governments in their legal disputes with other countries. The chapter on the history of the Bar in Germany by Professor Dr. Claudius Freiherr von Schwerin, is particularly valuable. There is also a very instructive chapter on women lawyers by Dr. Margarethe Freiin von Erffa and Abogada Ingeborg Richarz-Simons.

We note that in Germany the movement in favour of women lawyers makes slow progress, and that in Berlin there are only 8 women advocates in practice as against 3,000 men. The countries in which women lawyers have so far been most successful appear to be France, England and, particularly, Holland.

The book of Dr. Magnus is not only very useful as a work of reference, but it contains also a great deal of matter which can be read with profit by lawyers everywhere.

It would be natural to translate *Rechtsanwalt* by "attorney," but that term will not fit here, seeing that the book deals with countries such as England, France and Italy, where the profession is still divided into two branches. The notaries, we may say incidentally, are not dealt with. And, speaking of the two branches, we may note that in Italy, since the drastic reforms of 1926, although *avvocati* and *procuratori* are on separate lists and have separate qualifications, it is possible, and is indeed common, for a lawyer to be a member of both bodies. In Italy the cry of *troppi avvocati* has been, perhaps, more bitter than elsewhere.

In France, also, in many of the special courts, such as the *tribunaux du commerce*, the *conseils de Préfecture* and others, *avoués* compete with *avocats*, and the question of uniting the two branches has frequently been raised.

The two chapters on the German *Anwaltschaft* by Dr. Magnus and Professor von Schwerin respectively give an English reader an excellent idea of the profession in Germany, its history and its problems.

The traditions of the English Bar go back so far that it is almost a shock to learn that in Germany until 1879 the Bar consisted of a very restricted number of government officials appointed by the Minister of Justice to assist the judges, and attached to a particular court.

"Free advocacy" was a great step in advance. That it has its dangers appears clearly in the most readable account which Dr. Magnus gives of the German Bar since the war when, for various reasons, its numbers have been swelling at a quite abnormal rate, a phenomenon observable also in other countries, notably France and Italy.

F. P. W.

THE SUPREME COURTS OF THE VARIOUS COUNTRIES OF THE WORLD.[1]

THIS work, dedicated to the German *Reichsgericht* on its fiftieth anniversary, gives an account of the organization and jurisdiction of the highest courts of most countries of the world and also of two non-national courts, the *Rota Romana*, and the Permanent Court at The Hague. In many cases the report is given by the President of the Court, and among the most interesting are that of the *Reichsgericht* by its President, Dr. Simons, and that by Mr. Anzilotti of the Permanent Court. Complaints of the law's delay are perennial everywhere, but we must admit there has been improvement. It would be hard to find a parallel to the case mentioned by Dr. Simons, in the final stages of which he was one of the judges, which had been going on in one form or another since the end of the fifteenth century.

It is interesting for us to notice complaints in Germany of the great increase in the number of divorce suits and of the trouble caused to the courts by the bad drafting of tax laws.

Dr. Simons thinks the age of compulsory retirement fixed for the *Reichsgericht* at sixty-eight is too low, and we notice that in France it is seventy-five for the *Cour de Cassation*. In countries like our own, where there is no age limit, it would be easy to mention judges who have performed their duties to the satisfaction of everybody long after seventy-five. One judge of great distinction in the Supreme Court of the United States is eighty-eight or eighty-nine.

Another point of interest to us is that in Germany the *Reichsgericht* and in France the *Cour de Cassation* are bound at the request of the government to give them an opinion upon legislative problems. In recent times it seems that German governments have availed themselves pretty often of this assistance.

Dr. Magnus's book will be a valuable work of reference, and he is to be congratulated on having got together such reliable reports from so many different countries.

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[1] *Die Höchsten Gerichte der Welt.* By Justizrat Dr. Julius Magnus. (Leipzig Moeser, 1929.) Pp. xii + 634.

A HISTORY OF ARBITRATION IN GERMANY.

THE award of prizes for essays on legal subjects has in many instances, such as that of the Yorke Prize, led to the publication of important contributions to legal knowledge. Dr. Krause's monograph on the historical development of the extra-judicial settlement of disputes in Germany is a case in point, for it owes its existence to the offer of a prize by the American Arbitration Association. We have in this volume [1] a very able, careful and detailed account of the growth of arbitration proceedings in Germany from the earliest times down to the present day, and as such it is indispensable to the student of continental legal procedure. It is interesting to note that resort to arbitration in Germany, as in this country, is becoming increasingly popular among men of business. The number of cases dealt with by the arbitration committee of the Mannheim Produce Exchange rose, for instance, from 226 in 1919 to 1,229 in 1921. It would, of course, be absurd to suppose that this necessarily involved a corresponding decline in litigation of the usual type, but both in Germany and in England there appears to be a growing tendency to endeavour to exclude the jurisdiction of courts of law over commercial disputes. It is difficult to say how far this is due to a desire for expedition, or to a desire to avoid law costs, or to a dislike of the publicity of the courts. A study of the development of arbitration in England, written on parallel lines to that of Dr. Krause, might throw light on the matter, and might conceivably be found to possess an importance extending beyond the boundaries of historical research.

H. C. G.

INTERNATIONAL PROTECTION OF TRADE MARKS.

THIS is the first volume [2] in the series of Harvard Studies in International Law. It was published primarily for the purpose of facilitating the work of the conference of trade mark experts and specialists of the various American countries which met at Washington in February of last year. As such, its scope is somewhat limited, but we are glad to note that Dr. Ladas proposes to publish a study of international protection of industrial property in general, under the auspices of the Bureau of International Research of Harvard. That he is extremely well equipped for this important task is abundantly clear from the pages of this preliminary sketch. The present position as to the international protection of patents and trade marks is not altogether satisfactory, although, as Dr. Ladas says, " one cannot praise too much " the work and the accomplishments of the Union for the Protection of Industrial Property, constituted in

[1] *Die Geschichtliche Entwicklung des Scheidsgerichtswesen in Deutschland*, by Dr. Hermann Krause. (Berlin : Carl Heymann, 1930.)

[2] *The International Protection of Trade Marks by the American Republics*, by Stephen P. Ladas. (Harvard University Press, 1929.)

1883 by the International Convention signed at Paris on March 20th. The difficulty, of course, in this, as in all cases of international action on commercial matters, is that uniformity of treatment is not always immediately possible, owing to divergences in municipal law and variations in commercial practice. But much can be achieved by seeking uniformity between groups of countries, a course of action which must inevitably pave the way to the attainment of the uniform removal of legal barriers which constitute a severe handicap to international trade. Dr. Ladas' study is an excellent illustration of the difficulties which exist, and of the methods by which they can be overcome.

H. C. G.

BANKING AND BILLS OF EXCHANGE.[1]

THE fourth edition of a book which has got an established position does not call for an extended review. This edition, like the preceding one, compares the Bills of Exchange Act with the Negotiable Instruments Act, now in force in most of the United States. This part of the book is of special value to English bankers and lawyers who frequently have to do with American bills. In a new section of fifty pages, Mr. Falconbridge deals with the thorny subject of conflict of laws in regard to bills. Many points in this field are unsettled, and the author suggests that "what is required is concurrent legislation by the British Parliament and by the legislatures throughout the British Dominions, and such legislation would have to be preceded by the preparation of a model statute" (p. vii).

The book has been thoroughly revised and the amendments as they appear in the Revised Statutes of Canada of 1927 have been noted. The differences between the Canadian and the English Bills of Exchange Act are just enough to make it easy to go astray without a guide, and where, as frequently, the language of the two Acts is identical, the references to Canadian cases will be useful to English lawyers.

F. P. W.

CONTINENTAL LEGAL HISTORY.[2]

THIS book, to which Mr. John Bassett Moore has given a Foreword, is a course of lectures on European Legal History. Although not published until after the lamented death of the writer, the lectures had, fortunately, been carefully corrected and were in a state suitable for publication. They make an extremely interesting and readable book, which gives in a clear and easy style the condensed results of studies in this field which had extended over more than forty years.

[1] *The Law of Banks and Banking, Bills, Notes and Cheques.* Fourth Edition. By J. D. Falconbridge, K.C. (Canada Law Book Co., Toronto, 1929.) Pp. lxi + 980.

[2] *The Development of European Law.* By Munroe Smith, late Bryce Professor of European Legal History, Columbia University. (Columbia University Press, New York, 1928.) Pp. ix + 316. Price 20*s.* net.

Mr. Munroe Smith took a doctor's degree in Germany in 1880, and from that time onwards was mainly occupied with Continental legal history. His lectures at Columbia University attracted many students, both from the Law School and the School of Political Science. No reader of this book will be surprised at this. Indeed, as a general introduction to the subject, it is the best book which we know. There are, of course, excellent histories of the French, German and Italian laws, to mention these only, but here we have a brief conspectus of the whole, well-proportioned and clearly presented. As a commencement of the study, the book is highly to be recommended. More advanced students may read it with pleasure and profit, but for them it has the serious disadvantage that the statements in the texts are not supported by references to the authorities, though there is at the end a useful list of some of the principal works. Mr. Munroe Smith touches very lightly on the history of English law, and that is quite natural. England lay, to a great extent, outside the general movement, and the common law, at any rate, is a native growth. The Continental laws, on the other hand, and more particularly the laws of Western Europe, have much in common and developed in a similar manner from the same or similar origins. Outside the sphere of the law merchant and of the ecclesiastical law, the English judges ploughed a lonely furrow.

The main topics on which Mr. Munroe Smith discourses are the early Germanic law, the interpenetration of Roman and Germanic laws, the rise and growth of feudalism, the Canon law, the Law Merchant and the "Reception" of the Roman law.

The book contains many shrewd observations, as, for instance, that the settlements of German *leti* in Roman territory during the late Empire were something like the Indian reservations in the United States; that the wealth of impediments to marriage in the canon law may be partly explained by a desire to counteract the dangerous tendency to inbreeding observed particularly in village settlements formed originally by kinship groups; or that when the Roman law was "received" as subsidiary law in Continental Europe its relation to the customary law or to post-Roman legislation was precisely that attributed in the United States to the English common law.

If the price of the book had been lower one would have predicted a good sale for it among undergraduate students of law.

F. P. W.

A CONTINENTAL DIGEST OF ENGLISH LAWS.

THESE are additional volumes[1] in the Digest of English Law, published by the International Society of Comparative Law in Berlin, with the support of the Berlin Chamber of Commerce. The Digest is based on

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[1] *Das Bürgerliche Recht Englands.* Band II. Zweites Buch, Obligationen. Nachträge zu Band I and II by Dr. jur Wilhelm Prochownick. (Berlin, Carl Heymann, 1927–29.)

Professor Jenks's well-known work, and the object kept in view is to bring the Digest up to date from time to time by the issue of supplementary volumes. Whatever opinions one may hold as to the wisdom of an attempt to digest English law along the lines of a continental code, there can be no doubt that the method is one which makes a very strong appeal to foreign lawyers. The present volumes afford further evidence of the very great interest which is being taken in English law in Germany at the present time, and the amount of detail which they contain is amazing. Nothing appears to have escaped the attention of the learned Editor, who is to be congratulated on the very thorough and capable manner in which he has carried out a very difficult task. To a comparative lawyer, Dr. Prochownick's commentary is of great value and interest, as he calls attention *calamo currente* to the main differences between the English and German law on the topics with which he is dealing. The citation of cases is somewhat erratic, particularly when such series as the Law Journal Reports are in question. This is, however, a fault which is common to all foreign treatises on English law, and the blame probably rests with us for not providing the foreign author with a clear guide to our methods of citation, which, moreover, is a matter on which English text writers not infrequently go astray. H. C. G.

FRANCO-ITALIAN DRAFT CODE OF OBLIGATIONS.

Both the French and the Italian Civil Codes include in a single title those contracts which are known to the Roman law as *locatio rerum*, *locatio operarum* and *locatio operis*. The reason for this is that Art. 1708 of the Code Napoléon, together with the definitions in Arts. 1709 and 1710, were taken almost bodily from Pothier's famous treatise, *Le Contrat de Louage*. The authority of Pothier was such that the phraseology of these articles was adopted without discussion by the Council of State, and from the Code Napoléon they passed with unimportant variations into the Italian Civil Code. A classification which includes under one heading such very different forms of human activity has been seriously criticized, and in the Franco-Italian draft Code of Obligations it is proposed to return to the Roman law conception of a tripartite division, and to carry it still further. Arts. 1568–1570 of the Italian Civil Code and the corresponding articles of the French Civil Code are to be abrogated and replaced by three distinct titles, which in turn are to be subdivided so as to distinguish the letting of immoveables from the hiring of moveables, matters which have become somewhat confused in the existing law. The French Code, in Art. 1713, for instance, simply states, "On peut louer toutes sortes de biens meubles ou immeubles," with the result that the same principles have been applied by the courts in the case of the letting of land and the hiring of chattels.

The provisions of the draft Franco-Italian Code, if they become law, will involve considerable changes, and these are very carefully and ably discussed by Commendatore Azara in his monograph on the subject.[1] His comments are all the more valuable owing to the prominent part which he is taking in the reform of Italian law, as Secretary-General of the Royal Commission on the Amendment of the Codes.

H. C. G.

NUREMBERG MALEFACTORS.[2]

THE ancient city of Nuremberg, the inhabitants of which have managed with remarkable success to preserve its antique appearance—letting the new city grow up alongside—has one of the most revolting collections of instruments of torture to be found in Europe. For a good many centuries the rack and the wheel were seldom long idle there. The citizens always had a great regard for their city. We note that in 1482 a discontented soldier who thrust with his spear at the carved stone eagle above the *Frauentor* and knocked off one of its claws was apprehended by the watch, and later beheaded in the market-place as one who had brought the dignity of the council into contempt. The secretaries of our preservation trusts might well sigh for times like this.

This book, which has some attractive plates, throws a good deal of light on society in Nuremberg in the sixteenth and seventeenth centuries, and especially on the thieves, coiners, witches and other undesirables who came into conflict with the rough justice of the civic authorities. Some of it is gruesome enough, but it is not so depressing to read of horrors when they no longer exist. F. P. W.

ENGLISH CONSTITUTIONAL HISTORY.

MR. A. M. WILSHERE'S *Analysis of Taswell-Langmead*[3] has been issued in a new edition, corresponding with Mr. Poole's revised edition of the parent work. Though the revision is not in all respects perfect, *e.g.* a misleading note on Magna Carta, *c.* 12, appears on p. 18, there is no mention of the Parliament of 1275 (p. 37), the main provision of Poyning's Law is omitted (p. 60), this little book is sufficiently accurate and will be of service to those for whose use it is intended.

D. L. K.

RELATIONS BETWEEN LANDLORD AND TENANT.

IN this little brochure,[4] Professor Sarfatti, who is well known as one of the leading comparative lawyers of the day, discusses the English Landlord and Tenant Act of 1927. English legislation, as he points out, is in advance of the law of the Continent on the question of compensation to tenants, though the position may perhaps be somewhat different when the draft Franco-Italian Code of Obligations comes into force. He expresses the opinion that English judicial decisions interpreting the provisions of the Act of 1927 are certain to prove of value to continental lawyers who are interested in the reform of those portions of their codes which deal with the relations between landlord and tenant.

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[1] *Della Locazione, secondo il progetto italo-francese*, by Antonio Azara, Consigliere di Corte d'Appello addetto alla Cassazione. (Milano: Società Editrice Libraria, 1928.)

[2] *Crime and Punishment in Germany, as illustrated by the Nuremberg Malefactors' Books.* By Theodor Hampe, translated by Malcolm Letts, F.S.A. (London: Routledge, 1929.) Pp. 175. Price 10*s.* 6*d.* net.

[3] *Analysis of Taswell-Langmead's Constitutional History*, 9th ed., by A. M. Wilshere. (London: Sweet & Maxwell, Ltd.) Pp. 133. Price, 6*s.* 6*d.* net.

[4] *Indennità per le migliorie e per interotto avviamento in Inghilterra*, by Mario Sarfatti. (Modena, 1929.)

H. C. G.

THE ALABAMA ARBITRATION.

Dr. Egidio Reale's monograph [1] is a brief exposition of the facts leading up to the Alabama Arbitration, and of the proceedings before the Tribunal. It is well documented, and, although it contains very little that is new, it is of interest as being a survey of the most famous of all international arbitrations against the background of the present-day movement for the abolition of war.

H. C. G.

RESERVATION IN THE CHURCH OF ENGLAND.[2]

This is the reprint of a chapter in the author's volume *Studies in Tudor History*, which is out of print. It gives a careful review of the evidence as to the law and custom of reservation during the years 1547–1661. Professor Kennedy says: "As far as this essay is concerned, the customs prevailing at any time in the Church of England are to me immaterial."

F. P. W.

GROTIUS SOCIETY [3]

The *Transactions* for 1928 contain much valuable matter. Nearly all the papers deal with political "actualities." Among others we notice the "Real Monroe Doctrine," by Mr. J. A. Barratt, K.C.; the "International Criminal Court," by Judge Caloyanni; the "Kellogg Pact," by Mr. C. J. Colombos; the "Constitutional History of Egypt for the last Forty Years," by Sir Maurice Amos, and the debate on the "Freedom of the Seas," between Commander Kenworthy and Mr. G. S. Bowles. There are *In memoriam* notices of Lord Phillimore and of Dr. Hugh Bellot.

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[1] *Le Règlement Judiciaire du Conflitde l'Alabama*, by Egidio Reale. (Geneva: Librairie Payot, 1929.)

[2] *The Law and Custom of Reservation*, 1547–1661. By W. P. M. Kennedy, M.A., Litt.D., with an Introduction by J. P. Whitney, D.D. (Cambridge: Heffer, 1929.) Pp. 31. Price 1*s*. net.

[3] *Transactions of the Grotius Society*. Vol. xiv, Problems of Peace and War. (London: Sweet & Maxwell, 1929.) Pp. xxxiii + 174. Price 7*s*. 6*d*.

We have also to acknowledge :[1]

La Succession aux Dettes Publiques d'État. By A. N. Sack. (Paris : Librairie Hachette.) Pp. 184.

Principes de Droit International Privé selon la Loi et la Jurisprudence françaises. By M. E. Bartin. (Paris : F. Loviton & Cie.) Pp. 634.

Studies in the English Social and Political Thinkers of the Nineteenth Century. Vol. i. From Malthus to Kingsley ; Vol. ii. From Herbert Spencer to Ramsay MacDonald. (Cambridge : W. Heffer & Sons, Ltd.) Pp. vii + 474 and v + 452. Price 12*s.* 6*d.* net each.

Source Book of Constitutional History from 1660. By D. Oswald Dykes. (London : Longmans Green & Co., Ltd.) Pp. xi + 505. Price 21*s.* net.

The English and Empire Digest. Vol. xlii. Small Holdings, Small Dwellings, and Allotments ; Solicitors ; Specific Performance ; Statutes ; Stock Exchange ; Street and Aerial Traffic ; Telegraphs and Telephones ; Theatres and other Places of Entertainment ; Time ; Tort. Vol. xliii. Trade and Trade Unions ; Trade Marks, Trade Names, and Designs ; Tramways and Light Railways ; Trespass ; Trover and Detinue ; Trusts and Trustees ; Valuers and Appraisers ; Water Supply. Vol. xliv. Waters and Watercourses ; Weights and Measures ; Wills ; Work and Labour. (London : Butterworth & Co., Ltd.)

Das Seeschiffahrtsrecht der Sowjetunion. By Dr. Heinrich Freund. (Stuttgart : Ferdinand Enke.) Pp. viii + 153. Price Rm. 9.

PERIODICALS RECEIVED.

American Journal of International Law.—Vol. 23, no. 4, October 1929.

RODGERS, WILLIAM LEDYARD, Political Reasons making Undesirable an International Agreement as to Freedom of the Sea ; FACHIRI, ALEXANDER P., Interpretation of Treaties ; SOWARD, FREDERIC H., The Election of Canada to the League of Nations Council in 1927 ; NOBLE, HAROLD J., The Former Foreign Settlements in Korea ; HAZARD, HENRY B., Attachment to the Principles of the Constitution as judicially construed in certain Naturalization Cases in the United States.

Canadian Bar Review.—Vol. vii, no. 10, December 1929.

MACDONALD, A. L., Liability of Possessors of Premises ; PREUDHOMME, J., Engineering in Relation to Law ; BASTEDO, FRANK L., Dominion Companies and the Saskatchewan Act ; ROSS, G. H., Interpreting the B.N.A. Act.

Columbia Law Review.—Vol. xxix, no. 8, December 1929.

NEWMAN, ARTHUR L., Damage Liability in Aircraft Cases ; HAVIGHURST, HAROLD C., The Constitutionality of the Transferee Provisions of the Revenue Act ; BLACK, FORREST R., A Critique of the Carroll Case.

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[1] Mention here does not preclude a later review.

International Labour Review.—Vol. xxi, no. 1, January 1930.

The Thirteenth Session of the International Labour Conference; Working Conditions in a Rationalized Undertaking: The Bata System and its Social Consequence, I; ISHIHARA, DR. SHU, A Study of the Relation of Working Hours to Climate; Wages and Hours of Work in the Coal-mining Industry in 1927, III.

New York University Law Quarterly Review.—Vol. vii, no. 2, December 1929.

BALOGH, ELEMER, The Traditional Element in Grotius' Conception of International Law; TOWNSEND, WAYNE L., Bank Deposits of Commercial Paper; CONBOY, MARTIN, Organized Crime as a Business and its Bearing on the Administration of Criminal Law; GARNER, JAMES W., Anglo-American and Continental European Administrative Law; NILES, RUSSELL D., Pleading Res Ipsa Loquitur; LEVY, IRVING J., Jurisdiction of the New York Courts in Divorce and Separation Actions; ALEXANDER, WILLIAM H. Jeremy Bentham: Philosopher and Reformer.

South African Law Journal.—Vol. xlvi, pt. 4, November 1929.

G. S., Mr. Justice Sutton; MCKERRON, R. G., The Juristic Nature of Contracts for the Benefit of Third Persons; POLLAK, WALTER, The Civil Jurisdiction of the Supreme Court of South Africa.

Wisconsin Law Review.—Vol. v, no. 5, December 1929.

Dean Harry Sanger Richards Memorial Number.

Journal du Droit International (Clunet).—Juillet-Octobre 1929.

PRUDHOMME, ANDRÉ, Les emprunts des États Brésilien et Serbe devant la Cour permanente de Justice internationale de La Haye; PHILONENKO, MAXIMILIEN, La Caution *judicatum solvi* en droit français moderne; DREYFUS, ROBERT, Convention du 12 Septembre 1928 entre la France et la Belgique ayant pour objet de régler les conflits en matière de recrutement militaire; SHATZKY, B. E., La défense des intérêts privés russes devant les tribunaux américains; SALEM, E. R., La clause compromissoire et l'arbitrage en Turquie.

Revue de Droit International et de Législation Comparée—Tome x, no. 4, 1929.

VISSCHER, CHARLES de, La Session de New-York de l'Institut de Droit International; ROLIN, LE BARON ALBERIC, Les Causes lointaines de la Guerre Mondiale; ARMINJON, P., Qu'est-ce que le Droit International Privé? MAHAIM, ERNEST, Les Conventions internationales du Travail; VISSCHER, FERNAND DE, L'Arbitrage de l'Ile de Palmas (Miangas); RUNDSTEIN, S., La Justice internationale et la Protection des Intérêts privés; INNOXIUS, L'Adhésion des États-Unis au Protocole de Signature du Statut de la Cour; KOSTERS, J., La Sixième Conférence de Droit international privé; BAAK, J. C., L'Avant-Projet du Code Pénal Italien dans ses Rapports avec le Droit International; TENEKIDES, C. G., La Créance des Émigrés prévue par la VIe Convention de Lausanne, du chef des biens, dont ils ont été dépossedés.

The following periodicals are also received; American Bar Association Journal; American Political Science Review; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque; Bolletino della Emigrazione; Bulletin de la Société italienne pour les Études de Droit industriel; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Chinese Social and Political Science Review; L'Égypte Contemporaine; Gesetzgebung und Rechtspraxis des Auslandes; Gold Coast Review; Headway; Hindustan Review; Instituto Ibero-Americano de Derecho Comparado publications; International Labour Office Bulletin; International Review of Agricultural Economics; International Year Book of Agricultural Legislation; Journal of the Parliaments of the Empire; Juridical Review; La Giustizia Penale; La Procedura Penale Italiana; Law Quarterly Review; League of Nations Journal; Madras Law Journal; National Municipal Review; Rapports Judiciaires de Quebec; Revista de Ciencia Juridicas y Sociales; Revista de derecho jurisprudentia; Revista de Identificacion y Ciencias penales; Revue Internationale de la Croix Rouge; Revue Internationale de l'Enfant; Social Sciences Quarterly; Studi di Diritto Industriale; University of Illinois Studies in the Social Sciences.

ERRATUM

Vol. XI, pt. 4, p. 246. In lines 25 and 26, the words "the first of the 'star class'" should read "the first offenders or the 'star class.'"

THE STRUCTURE OF THE EMPIRE.

[*Contributed by* T. BATY, ESQ., D.C.L., LL.D., *Associate of the Institute of International Law.*]

Can one British Colony sue another?—Five years ago, Sir Harrison Moore, in a learned article which appeared in this publication,[1] did the present writer the honour of commenting on the proposition, advanced in the *Harvard Law Review*,[2] that one British colony could not sue another.[3] Events have moved very rapidly since then, and the great Colonies are now indistinguishable from sovereign states. But the question of suit still remains an important one. The Crown Colonies and British India are still in truth as well as in name dominions of the Crown; and the various provinces of the federated states which have ceased to be colonies at all remain in a questionable position. No apology, therefore, is required for returning to the subject. The point I desire to emphasize is that one colony or province of a "dominion" cannot sue another, as it is only a mode of government, and not a corporation. As was remarked in my article in the *Harvard Review*, to allow the government of one colony to sue the government of another could only be compared to allowing the cook to sue the butler because he used the kitchen coals to heat the cellar.

Effect of Legislation making Unincorporated Bodies capable of suing or being sued.—It will be well, first of all, to dismiss Sir Harrison's initial criticism that the legislature can make, and has made, unincorporated bodies capable of suing and of being sued. The whole point here is that in the case of colonies no such legislation has been enacted. Naturally, if it had, my article would never have been written. But it may be well to notice that there would have been singular difficulties in the path of any such legislation. Where the British legislature has apparently introduced the rule which permits unincorporated bodies to be sued or to sue, it has done so as a matter of procedural convenience only. It has not allowed the innovation to alter the substantive rights of parties. As we all know, it was originally necessary that parties should be either corporations or individuals. Then it became convenient to allow partners to be sued in the firm name (which was generally the only name that a plaintiff knew); but the consequences of the suit were ultimately just the same as if the plaintiff had set out all their names, and execution was not limited to the partnership assets. The whole proceeding was simply one of procedural convenience: a plaintiff was allowed to call A, B, C and D "A and Company," or "The Vindex Bootlacers." The proceeding having been found convenient, it was extended to plaintiffs, *i.e.*, A, B, C and D were allowed to summarize themselves as "The Vindex Bootlacers." Finally, the convenience was extended, to a certain limited extent, to other unincorporated bodies of people, but in a very indirect way, and always without any interference with substantive rights. A Rule of Court of 1875[1] enacted that where there were numerous persons having the same interest in one cause or matter, one or more of them might sue or be sued, or might be authorized by a judge to defend, on behalf of, or for the benefit of, all persons so interested. This enabled the members of a club or an association (or any section of them) in certain cases to sue, be sued or defend in the name of one or more of their number; but it did not, and could not, alter the substantial consequences, which could never involve the limitation of execution to the "club's" assets. And for this reason, in *Walker* v. *Sur*[2] and in *Mercantile Marine Ass.* v. *Toms*[3] the courts refused an order allowing selected members to be sued as representing the club or Association. The reflection that the legislature can make entities which are neither corporations nor individuals subjects of suit is therefore irrelevant: because the legislature has not really done so, and would find itself much embarrassed if it tried.[4]

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[1] See *Journal of Comparative Legislation*, Third Series, vol. vii, pt. iv, p. 155.

[2] See 34 *Harvard L. R.*, 837.

[3] As to the use of the word "colony," see *infra*, p. 165.

Colonies are not Corporations.—In the next place, Sir Harrison points out that in the exercise of their royal agency the officers of the Crown may come into conflict with each other; and nobody will dispute this. But who is the proper person to settle the conflict? Clearly the King; and His Majesty is not generally bound to act on legal principles in deciding it, but will act solely for the good of the realm as a whole, and certainly will not attribute damages to one set of officers (the government of colony A) at the expense of another (the government of colony B). When Sir Harrison speaks of the "rights of distinct communities," and the impropriety of impairing them by adherence to obsolete technicalities, he is, if I may say so with great respect, begging the question at issue. If colonies have rights, so must regiments, men-of-war, government departments and the like. The test of whether such a body is capable of legal rights and duties is precisely whether or not it has been incorporated. If it has not, the necessary inference is that it is sufficiently close to the Crown for its interests to be safe in the Crown's care. It may be very proper for colonies to be incorporated. My point is that they have not been incorporated, and for this I rely on *Sloman* v. *Government of New Zealand*,[1] which has been unquestioned in England since 1875.

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[1] Now R.S.C., O. xvi, r. 9.

[2] [1914] 2 K.B. 930.

[3] [1916] 2 K.B. 243: cf. also *London Ass. for Protection of Trade* v. *Greenlands* [1916] 2 A.C. 15; and see *Bloom* v. *Nat. Fed. of Discharged, etc., Sailors and Soldiers* 35 T.L.R. 50.

[4] Cf. the present writer's *Vicarious Liability, passim.*

That a colony might well be incorporated is as obvious as the fact that a town may be incorporated. That colonies have not been incorporated is what I contend. That they ought to be incorporated (if autonomous) is, I think, gravely questionable. Unlike cities, they are entrusted with so much of the panoply of government that the unity of the executive throughout the realm ought not to be broken by the possibility of internecine litigation. The analogy of municipalities, I think, fails. The rights of "the community" are not left unprotected; they are the dearest concern of the Crown which created the community. Nobody can deny that it is owing to Crown action that Victoria and New South Wales, or indeed all Australia, are not one undivided "community" or a hundred "communities." The states are "communities" solely because the Crown mapped them out as such. Municipalities, having only the most restricted powers of legislation and executive authority, may be sufficiently remote from the activities of the Crown to be separate corporations. But a colony would not be wise to accept that degradation. This is, however, a digression. I was not concerned to argue the desirability or otherwise of colonial incorporation.

Cases where Crown appears to sue itself.—Neither is it at all to the purpose to observe that where the Crown represents distinct substantive rights its agents can sue each other. Here again the whole question is begged. Is the right of government one and the same throughout the realm? Now that the great Colonies are independent in fact and in truth, it is no doubt no longer one and the same. But I am speaking of the time when the authority of the King in Parliament was admitted to exist throughout the Empire—as it still does exist in the Crown Colonies. And I can see no warrant for splitting up the subjects of the King into "communities" ascertained according to the geographical way in which the King has from time to time assigned governors to them, and invested with independent common-law rights after the fashion of corporations. Sir Harrison's illustrations all turn on the existence of a real and admitted difference of substantive proprietary right; one of the substantive parties is not the Crown in another aspect, but is not the Crown at all, but the public (*A. G.* v. *Earl of Lonsdale*), a charity (*A. G.* v. *Dean and Canons of Windsor*) or the Lord High Admiral personally.[1]

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[1] 1 C.P.D. 563: *Annual Practice*, O. ix, r. 8A. "Colonial Government," O. x, O. xi, r. 1, O. xvi, r. 1.

As for *Williams* v. *Attorney-General for N.S.W.*,[2] that case certainly did not decide that one colony could sue another. All it amounted to was that the courts would at the suit of the Crown restrain one officer of the Crown from interfering with another officer's proper business. In all the other cases there is a real and substantial difference of interest between the Crown and the other party to the suit. The crux of the present question is simply this:

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[1] That the King may happen to be Lord High Admiral does not affect the principle: see Rothery, *Prize Droits*, 13, citing Lord Stowell in the *Gertruyder* (2 C.R. 293):—"So long as the office of Lord High Admiral continues to have a legal existence, it is extremely proper that the Droits and perquisites of that office should continue as anciently distinguished." That is, the interest is the substantive independent interest, enjoyed for his own personal advantage, of the ancient high officer of state; apart from, and independent of, that of the Crown. If the Lord High Admiral had had his grant of perquisites and droits on the terms that they were to be applied for the King's use, it would be another matter. In such an event it may well be doubted whether the Admiralty and the Crown could have been found as litigants on opposite sides. But as it is—"the Crown has ceded its rights to the Lord High Admiral," and the cession does not lapse or become suspended merely because no separate Lord High Admiral for the moment exists. The office and its rights existed adversely to the Crown before the date of the suit; it might any day exist adversely to the Crown again. It was convenient that, during the vacancy of the office, it should be notionally severed from the Crown in suit. The right of the Crown to prize, and the right of the Admiral to his private perquisites, are separate and independent things—and the fact that they may put money into the same pocket, through the King's being the Admiral, does not make them identical. The practice of separating the King from the Admiral in suit may have been illogical, but it is intelligible as the continuance *cy-près* of an old procedure. The severance of the King in Australia from the King in Canada is intelligible only on the ground that the realm has been divided in sovereignty, and is subject no longer to one supreme authority.

[2] [1915] A.C. 573.

Does the Crown govern a colony in the sole interest of that colony, or in the interests of the realm as a whole? And there ought not to be any doubt about the answer.

But the King's Government is Indivisible.—The King's exercise of government in a colony cannot be differentiated from the King's exercise of government in other colonies and at home. It is one government to be exercised for the benefit of the whole. Considerations of distance and of varying degrees of culture may lead to the practical administration's being entrusted to different hands; but the universal aim of the whole machinery is the safety, honour and welfare of the whole realm.

Sir Harrison Moore brings out with great clearness and force the difficulties of the situation created by the growing consciousness of personality on the part of the several colonies, and the gradual withering of the idea of the personal rule of the Monarch. We must of course mould the law to the ideas of the day, and it would not do to squeeze modern populations into a frame-work of ideas appropriate only to the days of sixty years since. But, after all, the Crown does stand for the interests of all—for the common interests of a united Empire. If we begin to distinguish the Crown in Victoria from the Crown in New South Wales, and then envisage the Crown in Dublin making war upon the Crown in London, we may indeed be very modern, but we shall at the same time be exploding the legal structure of the Empire, which everyone concedes is bound up with the unity of the Crown.

If, to use the language of blunt common sense, "the Crown" in Australia means simply the interests of the inhabitants of Australia, then this fundamental unity is broken. Events are moving very rapidly, and it may well be admitted that this is the correct interpretation of the present situation. It is obvious that the former self-governing Colonies are sovereign, or, at the very least, *mi-souverain*, states. In that case, they can no more be sued than other international states can be. But this was not apparent seven years ago; some would be found to doubt it now. It was while the Empire was still conceived of as a whole, with a single Imperial Parliament in the last resort supreme, that *South Australia* v. *Victoria* shook the basic conception of unity. If we compare *Sloman* v. *Government of New Zealand*[1] with *South Australia* v. *Victoria*,[2] we shall see at once that the Colony had stepped down from the position of a mode of sovereignty to that of an incorporated town. Newcastle, I presume, might sue Northumberland for a nuisance in the nature of a disturbance of franchise—and the constitution of Australia seems to regard the Australian Colonies as in the same position, namely, that of subjects with common-law rights and duties enforceable by suit. But nowhere in the Act nor in any Charter is there to be found anything like a formation of the Colonies into corporations; and certainly each of them would violently have repudiated such a character.

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[1] *Supra*, p. 159.

[2] [1914] A.C. 283.

Effect of Commonwealth of Australia Act.—Then, if not a corporation, with common-law rights and duties, had the Colony become a state? If so, it could have no rights or duties except such as are derived from international law. But did the Commonwealth of Australia Act mean to invest the High Court of Australia with the power of determining controversies of international law?

It is surely a startling thing to say that it did. Without a word of guidance, to put it into the hands of a new court to frame an international law, is a step which can hardly be supposed to have been within the intention of the authors of the Act. There is, in fact, a clear dilemma. If the Australian Colonies were regarded by the Act as subject to the common law, and capable of suit as such, they must have been somehow turned into corporations. If they were regarded as states subject not to the common law, but to the law of nations, they could not have been subjected to a common-law court. For the rights and duties of even a *mi-souverain* state are regulated by international law. Although we know that a vassal lord could perfectly well be sued in his suzerain's court, that state of things existed at a time when international law had not been disentangled from municipal law, and when feudal law included both. There is no reason why the High Court of Australia or the Privy Council of the Crown should not have been invested by the Act with jurisdiction over the controversies of colonies or other communities in Australia. But, unless these are corporations, the controversies must have been of an international nature and regulated by international law. Since no reference is made in this connexion by the Australian Act either to corporations on the one hand or to international law on the other, it is respectfully suggested that the famous reference contained in the Act to suits between states was wholly inept. It still appears to me that the Colonies were not intended to be degraded into corporations, and that neither were they meant to have the international rights and duties of international states.

Effect of Participation in Treaty of Versailles.—The position has altered since. By being admitted to participate severally in the Treaty of Versailles, it seems that the former Colonies have acquired an indisputable international status. It seemed at first so unlikely that this momentous result could be effected *sub silentio*, that many jurists clung to the rather strained, but possible, interpretation that the mention of the Colonies in the Treaty implied nothing, and was only a complimentary recognition of their efforts in the war—the preposition " for " not meaning " so as to bind," but " in order to make special mention of "—just as one says, " *Auld Lang Syne* was put in the programme ' for ' Scotland, *St. Patrick's Day* ' for ' Ireland and *The Maple Leaf* ' for ' Canada." In the same way, a whole body of plenipotentiaries might sign a treaty for the establishment of a scientific institute, on behalf of a single state, each appending his particular activity, " Sir A. B. ' for ' Applied Science, Lord X. ' for ' Pure Science, the Rt. Hon. O. P. ' for ' Mathematics." But it has become increasingly evident that the Colonies were regarded as entities in international intercourse, and the only question is, whether they were regarded as sovereign or *mi-souverain.*

The question can only be answered in one way. The status of *mi-souveraintè* presupposes a specific division and demarcation of the powers of sovereignty, and it cannot therefore be tacitly created. Unless there already exists some well-known form of demarcation which can be tacitly adopted, it is impossible tacitly to plot out the spheres of suzerain and vassal. Further, the Imperial Conference, emphatically placing all self-governing parts of the Empire on an equality, has made it impossible to point to any suzerain power. For the King, deprived of any government, ministers or armed force, cannot in reason be considered as suzerain of the various equal portions of the Empire ; nor can the United Kingdom have suddenly been reduced to the position of a *mi-souverain* state. Evidently, therefore, the great Colonies have become independent sovereignties, and New Zealand cannot now, any more than in the days of Mr. Sloman, be sued in the courts.

Position of " States " of Australia.—As to the " states " composing federated colonies, a distinction must be drawn. The " states " of the South African Union have so little independent power that they cannot be considered as enjoying any international personality ; and the various provinces of the Canadian Confederation are rapidly coming to assume the same position. Ireland, Newfoundland and New Zealand are not federations. The only question is as to the international status of the Australian "states"; and it would appear that the world, which still has some difficulty in admitting the independent sovereignty of Australia, can scarcely be supposed to have admitted the *mi-souveraintè* of its component provinces. Queensland has not yet sent a Minister to Washington; though it might be difficult to prevent it from doing so if the experiment were made.

But, if the Australian, Canadian and African subordinate provinces have no international existence, they still have a constitutional one. The independence of Australia does not turn the provinces into corporations, though it is the King of Australia's government and no longer that of the King of Great Britain and Ireland. Constitutionally and legally, the central government of Australia is not all-powerful in Australia or in any part of it (unless perhaps in Canberra). The provinces are channels of government, not subjects of government; and unless appropriate legislation has made them subjects of suit, they cannot sue each other; nor in principle ought it to have been competent to them to sue or be sued by the Commonwealth. Now that Australia has become tacitly independent, there is some colour for allowing such suits. In a federal constitution, the sovereign power is divided; and it is true to say that in some measure the Crown in Australia is concerned solely with the particularist interests of the inhabitants of Victoria or of New South Wales. "The Crown" henceforward must be in a position to sue itself, because the King is partly King of Australia and partly King of Queensland. Although in neither capacity could he be sued abroad, it would seem that the legal separation of powers inherent in a written federal constitution would involve the possibility of mutual suit in the appropriate local courts.

Anomalies of the Present Situation.—It is extraordinary that the present position of Great Britain *vis-à-vis* her *ci-devant* Colonies has been permitted to arise. It is not an adequate excuse or explanation to remark that we shall somehow "muddle through." We muddled through the American War—and broke up the Empire. It is not given to everybody, like the late Mr. Chamberlain, to break up a Party twice; empires are still less prone to give muddlers a second chance. Nothing has been done to secure that the law of treason and allegiance shall be the same throughout the loose confederacy which we call the Empire. Nothing has been said as to whether the Crown in one "equal" member of the confederacy is liable to discharge the obligations, financial and other, incurred by the Crown in another. Nothing has been arranged as to the succession, or the coinage, or the merchant-fleet in foreign ports, or the nationality of subjects abroad, or the mode of settling differences between the confederates, or the appointment of Governors-General. And it is dead in the teeth of the theory of "equality" that the United Kingdom has the sole supremacy over the Crown Colonies. Further, it is a fact incompatible with equality, that the United Kingdom has the conduct of the foreign relations of the confederacy as a whole. For, although various other of the confederate states may maintain foreign relations, these can only regard themselves, and no pretence can be made by their envoys to speak for the "empire."

How this odd and dangerous position has come about is one thing. How the law of England, which, unless it has been specifically altered, is the constitutional law of the former colonies, regards it, is another. It will be seriously contended by few that the Crown on the advice of a responsible Minister cannot grant independence of the Crown in Parliament to any portion of its realm. But that the Crown should tacitly have granted independence to the great Colonies,[1] with so little precaution and so little regard to public opinion, seems a difficult position to maintain. Has the legislative omnipotence of the British Parliament been spirited away—we cannot say "signed away," for there is no signature to anything by anybody—behind its august back? Surely that is too bold a conclusion for any lawyer. It is not so much a grant of independence as the successful assertion of independence that is exhibited. International law looks at facts; and where supreme power resides, there she will see independence. English law (when judges have sufficient independence to decline to take their law as well as their facts from the Foreign Office) follows the law of nations, and admits the independence of those communities which have practically secured it. In this somewhat slipshod and circuitous way, it is to be presumed, the Imperial Parliament seems to have ceased in law, as in fact, to be supreme throughout what we will for once allow ourselves to call the dominions of the King.

Whether it is wise for a country to assume the responsibility for protecting those whom it cannot control may be a question. It is plain that the less powerful members of the confederacy are in a much more favourable position with regard to the United Kingdom than are weak states which are unconnected with the Empire. Lords Rosebery and Kimberley invaded Nicaraguan soil in order to exact a cash solatium for British subjects who had been expelled by the territorial government. But Sir Henry Campbell-Bannerman (or was it Lord Oxford ?) had actually to support Natal with British troops when the Natal government was suppressing Zulu unrest by methods which were disapproved of by every Liberal in the kingdom. There must be a limit to the extent to which this complaisance can be carried. A law court may say in its comfortable fashion that it will deal with a difficulty when it arises. But it is the function of statesmanship to anticipate difficulties and to solve them before they arouse antipathies and rancour.

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[1] The word "Dominions" has become so unfortunately ambiguous, and so misleading to foreign observers, according as it is spelt with a small or a large initial, that it seems preferable to avoid its use.

General Conclusion.—It may be concluded that, so long as the colonies acknowledged the theoretical supremacy of the United Kingdom, to be exercised in the interests of the whole Empire, they were territorial channels of the King's one government, and incompetent to sue one another, even when their functions were the subject of demarcation, as in the case of the federal colonies.[1] And the position remains the same as regards the Crown Colonies, and perhaps British India. The former self-governing colonies have tacitly become sovereign states, and cannot sue each other any more than other independent states, for their relations are governed by the law of nations, and not by municipal law. Their provinces, when possessed of a real constitutional share in the sovereignty, may be able to sue each other for the maintenance of the rights conferred by the federal constitution, and perhaps on other grounds, as corporate entities, as well, representing, as they do, the sole and particular interests of their respective populations, and the federal constitution must be decisive on the point. Constitutionally, such provinces are a new phenomenon in English law. They can only be compared to the Counties Palatine of mediæval times, and to the Isle of Man under the vassal kings. But these problems of constitutional federal justice must be left to be worked out in their own place. Foreign countries, other *ci-devant* colonies and the United Kingdom will each have their own opinion as to the status of such federated communities. It is submitted that as some portion, though not the whole, of the internal sovereignty resides in the component provinces, they should properly be regarded abroad as organs of the sovereign power which is *internationally* vested solely in the central government, and consequently as in principle exempted from suit. If there are two kings of Brentford, or of Sparta, it is not only the conjoint pair which would be exempt from suit, as a sovereign, but each of them separately. In the same way, it would appear that each member of a sovereignty shown to be composite should enjoy in the United Kingdom the privileges of sovereign power. Whether Quebec could sue Queensland in the English courts must depend on the view which those courts took of the sovereign nature of the Queensland government. It is not enough, I think, to urge that internationally Queensland has no existence or sovereignty. In international controversies, or for the broad purposes of international law, that is perfectly true. But for purposes of suit there is no reason why the subtleties of constitutional law should not be investigated by a court and the participators in the sovereignty ascertained.

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[1] In the case of Canada, the omnipotence of Parliament specifically made them competent.

It is difficult to understand the position of those who cling to the belief that the " British Empire " is a new category of state structure, *sui generis* and incomprehensible except by the eye of faith. If we look at realities, we shall see that, with the acceptance on all hands of the assertion of equality as between the former colonies and the United Kingdom—no new person or body being invested with supremacy over all—the Empire has become a loose confederation of which the United Kingdom is at present the member of transcendant importance. The fiction by which an imaginary single " Crown " is supreme—a Crown which is a different Crown from whichever angle it is viewed—is too transparent to disguise the facts. And the failure of Parliament to assert its rights is tantamount to a confession that they have disappeared.

LEGAL ADMINISTRATION IN EGYPT.[1]

[*Contributed by* SIR MAURICE S. AMOS, K.B.E.]

THE subject upon which I propose to address you this afternoon is that of the administration of justice in Egypt during a period approximately equivalent to the last two generations, that is to say, from the year 1875, when the mixed Tribunals, or International Courts, were established in that country, until to-day. The process which gives unity, and, as I hope, may lend some interest to this subject is that of the reorganization of the administration of the law in an oriental country on modern European models. The influences which have been at work in this process, besides the very real spontaneous desire of Egypt herself to modernize and to reform her traditional institutions, have been twofold: first, what I may call the Latin influence—the influence of France and Italy, an influence which was first in the field and which has remained predominant; and secondly, the influence of English ideas and standards, an influence which was brought to bear as the result of the British occupation, and of the responsibility assumed by British administrative authorities for the working and development of the very composite system which they found in existence when they appeared upon the scene. And I shall have occasion to present to your eyes the spectacle of English judges and law-officers playing an active part in promoting and assisting the better administration of a system of law, partly Mohammedan, but predominantly French in form and character—systems, that is to say, diverging in important respects from standards and principles to which we in this country are accustomed to attach considerable importance. That task was performed under conditions which made it difficult, or more usually impossible, to convey our message and to preach our national gospel in the most effective manner, namely by explicit amendment in the Statute law of the country.

Multiplicity of Jurisdiction.—The most characteristic and remarkable feature of the Egyptian legal system consists in the multiplicity of jurisdictions which divide among them the litigious business of the country. This judicial mosaic preserves for our inspection in modern times an illustration of mediæval ideas. The dominating conception is not that of a necessary unity and subordination of all the inhabitants of the country under a single system of laws, inspired by a single plan of policy, and enforced by a single sovereign authority. The underlying conception is rather that the political sovereign is concerned with a strictly limited range of interests, let us say with taxation, defence and the maintenance of the State religion; and that for all the rest of government it is sufficient to rely upon the natural tendency of the various classes and communities into which the population spontaneously organized itself, to secrete their own laws, and to organize their own courts and judges. The lordly and indifferent tolerance which mediæval kings had commonly shown for the communal self-discipline of foreign merchants had not only been imitated and preserved in the Turkish Empire down to modern times, but had been extended, to a degree unknown in Europe, to religious communities which dissented from the official religion of the State. Nowhere had the forces of what I may call the specialization or decentralization of judicial and legislative authority been carried farther than in Egypt; and at the moment which I have taken as the beginning of the period of modern reform, namely in 1875, it would be possible to enumerate as many as nearly thirty independent jurisdictions, each claiming, in virtue of charters, treaties and the most respectable tradition, its own sphere of law, its own circle of suitors. Between any two of these jurisdictions there might at any moment arise a conflict which no other authority in the State possessed indisputable jurisdiction to resolve.

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[1] A lecture delivered at the London School of Economics on March 12, 1930.

When I say that this was the state of things which existed at the beginning of the epoch of modern reform you may naturally anticipate that before the end of the hour allotted to me I am going to relate how this heterogeneous system has been reduced to simplicity and to unity, and how the various competing jurisdictions have at any rate been brought under the controlling and harmonizing authority of a single Supreme Court. This is not the case. There has been some simplification. The institution of the Mixed Courts at the beginning of my period constituted a great advance in this direction; but although the problem has never been lost sight of, and though on two occasions elaborate and far-reaching plans of reform have been worked out and discussed in some detail, Egypt at the present day still offers the spectacle of a mosaic of independent jurisdictions.

The principal distinction to be drawn is that between the courts of law appropriate to Ottoman subjects—or, since Egypt ceased to be a Turkish province, to Egyptians—and to non-privileged foreigners on the one hand, and the jurisdictions appropriate to foreigners enjoying treaty rights of ex-territoriality on the other.

Jurisdiction of the Codes and of the Patriarchs.—In 1875 the native world, that is to say, the vast majority of the population of Egypt, was subject to two principal types of jurisdiction: that of the Cadis, applying the Mohammedan Common Law, according to the Hanafite rite; and that of the Patriarchs of the divers Christian sects. The names of the patriarchates are sufficiently picturesque to be worth enumerating. They were: the Orthodox Coptic patriarchate; the Catholic Coptic patriarchate; the Orthodox Greek patriarchate; the Catholic Greek patriarchate; the Maronite patriarchate; the Orthodox Armenian patriarchate; the Catholic Armenian patriarchate; the Catholic Chaldæan patriarchate; the Orthodox Syrian patriarchate; the Catholic Syrian patriarchate; and the Rabbinical jurisdiction of the Jewish Community. All these different religious authorities exercised and still exercise jurisdiction over their members in all questions relating to marriage, divorce and the administration of estates where all interested parties acquiesce in the jurisdiction. Guardianship was taken away from the Patriarchates by a law of 1925. Subject to these exceptional jurisdictions, plenary judicial power in all branches of the law was, in theory, vested in the Cadis, with a final appeal to the Court of the Grand Cadi sitting in Cairo. I have said that in theory the Cadis, applying the Common Law of Islam, were, subject to the privileges of the non-Mohammedan communities, invested with a plenary jurisdiction over all Ottoman subjects in Egypt. But this was true in theory only. In practice important topics which would normally belong to the jurisdiction of the Cadis had come to be appropriated by the administrative authorities. I am speaking of a dark period, of which, when I myself entered the service of the Egyptian Government some twenty years later, all memory and record had already almost vanished. But I believe it to be the case that at the end of what I may call the *ancien régime* in Egypt, criminal jurisdiction over natives of the country, the administration of the land-law, and of course all fiscal matters, were in the hands, not of the learned Cadis, but of the administrative authorities, taking their orders from the executive government in Cairo.

Another sphere of judicial function which had been subtracted from the jurisdiction of the Cadis was that of scrutinizing the accounts and controlling the activities of guardians, committees and other persons in a fiduciary position. This function was discharged by administrative bodies, known as Meglis Haslys, or committees of accounts, which were and are composed of notables of the district, sitting under the chairmanship of an administrative officer. As in each case they also included a member of the family interested, they faintly recall the French family council. Doubtless for this as well as for other reasons this institution has survived the modernization of the judicial system and has itself been modernized and endowed with an appropriate code of practice. But in old days these committees had an evil reputation for delay and *paperasserie*, surpassing that even of our own old Court of Chancery. And the story used to be told of an active and inquiring Treasury official who in the course of routine duties encountered a modest file of papers, which on examination seemed to suggest the desirability of inquiring into the proceedings in a certain case of one of these committees of accounts. The active official directed that all the relevant papers, then lying in the archives of a provincial prefecture, should be sent for to his office in Cairo. Some weeks later, going down to his office in the morning, he found forty carts drawn up in the street, before the Treasury, each piled high with bales of papers, the forty cart-loads constituting the complete dossier for which he had imprudently asked.

The Cadi.—I have sometimes thought that Modern Egypt has not been entirely just to the old Cadis of the *ancien régime.* In the eyes both of Egyptians and of Europeans they have seemed to be identified with bad old times when standards of government had fallen very low; their education was free from any tincture of modern enlightenment; and progress has largely consisted in their replacement, as the common-law judges of the land, by a new class of men, of wider and more secular education, of higher social status and more intimately allied with power, both administrative and political. The old-fashioned country Cadi had come to be thought of as having been little more than a faint and embarrassed figure, resigning himself impotently to the forces of corruption. This picture gave imperfect credit to a very real and a very respectable tradition. The great Mohammedan University of the Azhar at Cairo, where these men and their predecessors, ever since the Middle Ages, had received an intensive schooling, has never, in spite of its hostility to new learning, lost its corporate pride or its self-respect; and when better days came, it was evident to the sympathetic observer that the Cadi was the bearer of a tradition which was worth preserving, and which without him would have been lost; a tradition of learning and of respect for learning—narrow, pedantic and scholastic perhaps, but still learning; he was also the preserver of a tradition of dignity of manner and bearing which undoubtedly derived support from the beautiful national dress, which modern enlightenment, to its great loss, so rigorously rejects in favour of the international uniform of European democracy. Shorn of his ancient powers, and relegated as he is to a subordinate place in the judicial system of his country, the Cadi of a small Egyptian town often appears to-day, as, bearded and robed, he holds his little court, or walks with dignified bearing in the street, to be the depositary of something of value which the invasion of Western manners is tending to destroy.

Community of Native Protestants.—Let me, before I travel too far away from the subject of the Patriarchates, say something of the judicial organization of the Community of Native Protestants. This organization, which is comparatively modern, is of interest as showing that the impulse to create new jurisdictions appropriate to special communities has continued to display vitality down till our own time. So long ago as 1850 a Turkish Imperial Firman, or charter, had created a community of Native Protestants in Turkey; and in 1878 a *wakil*, or Lieutenant of the Native Protestants, had been appointed in Egypt, with a jurisdiction similar to that of the Patriarchates of the other Christian bodies. But the fact was overlooked that the general category of Native Protestants was not only somewhat ill-defined as to its limits, but was of a very heterogeneous character. Its members belonged to various Protestant Churches, whose tenets on such matters as marriage and divorce differed widely from each other, and were commonly governed by the national law of the foreign mission-churches concerned. It was not until the year 1902, after prolonged negotiation and discussion, that a decree was promulgated organizing the Native Protestant community in Egypt on a more satisfactory basis. This decree provides that the community should be composed both of Churches adhering as corporate bodies on behalf of all their members, present and future, and of individuals. The governing body of the community was authorized and directed to apply, in matters of personal status and family law, such codes of rules as might be put forward on the authority of the several Churches belonging to the community. This institution is still in existence, and appears to have worked in a perfectly satisfactory manner.

Conflicts of Jurisdiction.—I have said that there was no judicial institution which had authority to adjudicate in cases of conflict of jurisdiction between these diverse courts of family law. Nevertheless, conflicts of jurisdiction not infrequently arose, as for example in matrimonial cases, where the husband had, as not infrequently happened, changed, or purported to change, his sect or religion since the marriage. In consequence of a declaration of divorce, or other matrimonial grievance, the wife might have brought proceedings for alimony before the Patriarch under whose ægis she had been married, while her husband might have sought to obtain easier terms by taking action before his new spiritual governor, it might be before the Cadi. Up to the date of my last information, the problem of creating a satisfactory tribunal to adjudicate upon such conflicts had always proved too thorny for solution; and the way out which was consecrated by tradition was not without interest, partly because once again it recalls the way in which, in our Middle Ages, new jurisdictions were built on the basis of the prerogative. None of these special courts of which I am speaking possessed the power of enforcing their own judgments. Enforcement could only be had at the hands of the executive authorities; and when in doubt, and particularly when they were invited to give effect to two conflicting decisions rendered by competing courts, the local executive officer, the prefect or governor, would refer the problem for instructions to his official chief, the Minister of the Interior. The Minister referred the matter to his legal adviser; and the opinions given by the legal adviser to the Minister of the Interior on the limits of jurisdiction of the various courts of family law have gradually been built up into a body of law.

Legal Institutions of Foreign Communities. The Capitulations.—I now turn to the legal institutions by which the foreign communities in Egypt were governed. The foreign population of Egypt has never been very numerous, when compared with the whole population of the country; but the importance of the foreign colonies has been great, not only politically and commercially, but from the influence exercised by their example upon the habits and standards of the country as a whole. I need hardly dilate to this audience upon the importance in the Turkish Empire of the system of the Capitulations, under which foreign residents were, generally speaking, exempted from the legislative, executive and judicial authority of the Turkish State. This system, resting originally on treaty, had been extended by usage; and nowhere had usage carried immunity from the authority of the native government farther than in Egypt. Previously to 1875 a foreigner resident in Egypt, who enjoyed capitulary privilege, an Englishman for example, was, broadly speaking, subject to no government authority save that of his own consul, and to no laws save such as his own sovereign might have authorized his consul to apply. He committed an offence only when he broke the laws of his own country; and he was triable only by his own consular judge. In civil disputes again his judge was his consul, even when he was sued by a plaintiff belonging to another nationality; while conversely, if he desired to sue an Ottoman subject or a foreigner of a nationality different from his own the rule *actor sequitur forum rei* was strictly applied, and he had perforce to carry his action against a native defendant before the Cadi, or against another foreigner before the defendant's consul.

The Mixed Tribunals.—As the commercial relationships between Egypt and Europe developed, and led to the ever-increasing investment of European capital in the country, and the establishment in increasing numbers of foreign merchants, bankers and commercial houses in Egypt—a process which received a marked impetus from the opening of the Suez Canal—the legal anarchy was increasingly felt to be intolerable. The spectacle was offered of a growing business community which had not only no common jurisdiction, but no common commercial law or law of contract. The initiative for reform came from the Egyptian Government itself, in the person of one of the most vigorous men who has ever directed Egyptian affairs, namely the then Prime Minister, the late Nubar Pasha, an Armenian by origin. After some years of arduous negotiation with the fourteen European governments which enjoyed capitular privileges in Egypt, he succeeded in securing the establishment by Treaty of the Mixed Tribunals. The necessary legislation was passed in the year 1875, and the new courts began to hear cases in February 1876. It was originally hoped and intended by Nubar Pasha that the new institution should be invested not only with jurisdiction in all civil disputes between foreigners of different nationalities and between foreigners and Ottoman subjects, but should exercise a plenary criminal jurisdiction over all foreigners. This programme he was not, however, able to realize; the time was not yet ripe; and even at the present day the Mixed Courts enjoy only a very limited criminal jurisdiction confined to offences against police regulations, punishable with twenty shillings fine or seven days imprisonment, to bankruptcy offences and to offences in the nature of contempt of court. The consuls retained, and have retained until the present day, a threefold jurisdiction over all matters of family law and succession affecting their administrators, over all civil litigation where both plaintiff and defendant are of their own nationality and over all criminal causes outside the narrow domain acquired by the Mixed Courts.

I ought perhaps to explain that while the judicial staff of the new courts was composed of both foreign and Egyptian judges, the foreign element being in a majority in every court, the courts were and are Egyptian courts. They render justice in the name of the Egyptian sovereign, and their officers are entitled to call upon all Egyptian authorities for assistance in enforcing their decrees.

Common System of Law.—Of no less importance than the creation of a common civil jurisdiction for mixed suits was the provision of a common system of law for the new courts to apply. In 1875 there was only one possible solution for this problem. It was only to France that it was possible to look for a system of law which could be applied at short notice to a community composed of citizens of fifteen different nations. The Mixed Courts were accordingly equipped with Codes which were somewhat hastily derived, by a process which seems to have been little different from one of scissors and paste, from the French Codes. The draftsman, or perhaps we should rather say the editor, was a certain French barrister practising in Egypt, of the name of Manoury. He has a greater fame as the father of that General Manoury who materially contributed to the victory of the Marne by taking the garrison of Paris in taxi-cabs to reinforce the left flank of the Allied front. Tradition has it that Manoury *père* made the Egyptian Codes in a fortnight at the seaside, and that his instructions were marked with a fee of £10,000. But, however hastily or lightheartedly the compiler of the Egyptian Mixed Codes may have gone about his task, it is impossible to exaggerate their importance for Egyptians' cultural development. It impressed upon the whole evolution of the institutions, the habits of thought, the social manners, of modern Egypt a French mould so profound and indelible that forty years of British direction of the administration has had but little effect in weakening it. Modern Egypt has had two sponsors, France and England; but in many respects it is still true that the influence of the French godmother is more evident than that of the English godfather; and if that is so, it is almost entirely because the godmother, as her christening gift, gave her law.

One of the immediate consequences of the adoption of Codes on the French model was that the courts looked to French authorities for the interpretation of the law; indeed over the whole range of subjects which fell within the jurisdiction of the Mixed Tribunals it is fair to say that the common law became and is to-day the common law of France. In fact, so strong has this attraction proved to be that in several instances, when Mr. Manoury's hastily prepared codes departed too glaringly from the established principles of French jurisprudence, the Mixed Courts have not hesitated to ignore the code in favour of French tradition. Among other immediate consequences were that French became the language of the courts and of conveyances, a fact which helped to secure its supremacy as the language of commerce. Furthermore, French law and the use of the French language gave a practical monopoly at the Mixed Court bar to French, Italian and Greek lawyers, a monopoly upon which counsel of other nationalities have made but rare inroads.

Native Courts.—Eight years after the establishment of the Mixed Courts, in the year 1883, that is to say, a few months after the occupation of Cairo by the British troops, the direct sphere of French influence received a further wide extension by the establishment of a system of judicature to which, as in private duty bound, I must call your particular attention. This institution is that of the so-called Native or National Courts. This system was created for the purpose of administering on reformed, and particularly on French, lines the whole business of criminal and civil justice in which no foreigner was concerned, and which had no connexion with personal status. That is to say, that these new courts took over the whole sphere of civil and criminal jurisdiction over Ottoman-Egyptian subjects, with the exception of probate, divorce and the guardianship of infants and lunatics. The new native courts differed from the Mixed Courts in important particulars; the people over whom they exercised jurisdiction were confined to those who could claim no foreign privilege; they were staffed almost exclusively by native Egyptian judges; the language they employed was the vernacular Arabic of the country; and last, but not least, they enjoyed, unlike the Mixed Courts, a plenary criminal jurisdiction over the vast majority of a population sadly addicted to larcenous and violent, though not to fraudulent, crime. The result of these differences was that while the Native Courts rapidly acquired and continually increased their pre-eminence in civil business, this pre-eminence was and has remained almost purely statistical; the great commercial and constitutional cases have always been found to involve a foreign interest and consequently to fall within the purview of the international courts. The speciality of the Mixed Courts has lain in the domain of civil and commercial litigation, that of the Native Courts in that of the criminal law. The jurisdiction of the Cadis and of the Patriarchs in matters of family law remained, and has remained to this day, undisturbed.

Native Civil Code.—The Codes with which the new Native Courts were endowed were practically, though, curiously enough, not absolutely, identical with those of the Mixed Courts. There are a few peculiar differences between them. Under the Native Civil Code, for example, the assignment of a debt is not valid save with the consent of the debtor, while under the Mixed Code notice is sufficient. Discrepancies such as this have sometimes given rise to the singular phenomenon of a genuine problem in the conflict of laws arising between the statute laws of the same country. Was the debt which had been assigned with the knowledge but without the consent of the debtor governed by the Native or by the Mixed Code? In the former case the assignee had acquired a good title, in the latter case not. In some cases the answer might be doubtful, not in respect of the facts, but as a matter of legal principle. Let me say, by the way, that the Codes, the extension of which to govern the great mass of the native population had so capital an effect in extending the influence of French culture, are five in number; these are three Codes of substantive law, the Civil, the Commercial and the Criminal Codes, and two Codes of adjective law, the two Codes of Civil and Criminal procedure.

Prestige of the Courts.—It would be an understatement to say that these two collateral systems of judicature, the Mixed and the Native, have justified the hopes of their creators. I hope I shall not be taxed with partiality or with an unduly provincial patriotism if I quote with agreement a saying which was made on a public and ceremonial occasion, after the Mixed Courts had been in existence for fifty years, that they had proved to be the most successful international institution which the world has hitherto seen, with the exception of the Vatican. The League of Nations is a newcomer in this honourable competition. As I am shortly about to criticize some of their ways of doing business, I wish most particularly to emphasize my sense of the respect which is due, and which is unhesitatingly paid, by all who have lived under their authority, to those remarkable courts, where you may commonly find an Englishman, a Greek and two Egyptians sitting under the presidency of a Norwegian, transacting their business in French, and giving, in a suit between a Belgian and an Italian, a judgment which may be compared for learning, lucidity and good sense with the decisions of any court in the world.

A circumstance which has greatly contributed to the prestige of both the Mixed and the Native Courts is that they were endowed at birth—first the Mixed Courts, and then, I think, by almost unconscious imitation, the Native Courts—with a substantially unlimited jurisdiction in suits against the Egyptian Government and all public departments. It may well excite surprise, in view of the jealous restrictions placed both in England and in France upon the right of private persons to sue the State before the ordinary courts of law, that the Egyptian Government should have acquiesced, at a time when it had no pretension to being other than an autocratic government, in the exercise of so high a prerogative by courts whose reputations were yet to be made. This is perhaps more surprising in the case of the Mixed Courts than in that of the Native Courts, since in the former case the Egyptian Government enjoyed no reserve power to reverse by legislation any completely unacceptable decision, had such been rendered. In point of fact, in the fifty years or so during which the jurisdiction has been exercised, it has never had other than good results; the Government has frequently lost important and hard-fought actions, but never in such a way as to bring into question the competence or impartiality of the tribunal before which it was arraigned. A recent example of an important action successfully brought by private persons against the Egyptian Government in the Mixed Tribunals is furnished by the suit brought some six years ago by the Bank of England and others to enforce the continued payment of the annual tribute payable by Egypt to Turkey, tribute which Turkey had pledged to its own creditors, a liability from which Egypt had sought to be discharged on the ground that she had ceased to be a Turkish tributary province. The capitalized value of the liability at stake in this case was some 13 million sterling. I have often heard the legal advisers to the Government departments enlarge with satisfaction upon the fact that the doors of the courts stood wide open, a fact which provided a satisfactory and conclusive answer to the dissatisfied contractor or the dismissed civil servant whose importunity could be so adequately met with the reminder that while the Treasury believed that he had no case, the last word lay with the judges, whose specific business it was to decide just such questions.

Administrative Law.—The possession by the common courts of the land of this wide jurisdiction, a jurisdiction which extended not only to matters of property or contract, but to tort, and under which the State enjoyed practically no privileges of any sort, meant that although Egypt derived almost all her modern legal principles from France, there was and is in Egypt nothing that can be called administrative law, that is to say, in the somewhat misleading sense in which the term is used, as a term of abuse, in England.

Even where administrative tribunals existed, as for example for the domestic discipline of civil servants, a final appeal to the courts of common law was not wholly excluded, and was on occasion successfully resorted to.

Now I must tell you that it was undoubtedly the case that this readiness of the Egyptian Government to acquiesce in the enjoyment of no more privileged status, for litigious purposes, than that of a private person was due in part to the fact that Egyptian Civil Procedure, modelled as it is on that of France, possesses none of those remedial institutions which were invented in this country by the Court of Chancery; it knows nothing of discovery, or of interrogatories on oath, just as it knows nothing of the injunction or of specific performance. In these important respects Egyptian and French civil procedure have preserved the principle of our own common law, what is sometimes called the "accusatory" principle, which requires the plaintiff to prove his case from his own materials, without such assistance as he might obtain from the court applying inquisitorial pressure upon the defendant. Government departments have less to fear, or so they sometimes think, from plaintiffs who must rely on their own resources than from plaintiffs armed with the potential right to probe secrets of State.

The Accusatory Principle.—And allow me here to digress for a moment to call your attention to a somewhat paradoxical circumstance. With the assistance of the Court of Chancery, we have in this country abandoned the accusatory principle in our civil procedure, and have replaced it, in a manner and to a degree which appears shocking to the Continental world, by the inquisitorial principle. Under our modern procedure, owing to discovery, interrogatories and cross-examination in the witness-box, supported as these engines are by the terrors of contempt, and by the criminal law, the defendant, or for that matter the plaintiff, finds it difficult to conceal any matter within his knowledge which may be of advantage to his adversary. On the other hand, in criminal matters we still in England adhere strenuously, though with obvious difficulty, to the accusatory principle. In theory at any rate the Crown must still, in a criminal cause, prove its case, according to the best traditions of the high Middle Age, without recourse to any extortion from the defendant. Nobody, as we all know, is in theory liable, if he is suspected of having committed a crime, to be questioned by any servant of the Crown intent on discovering and convicting the criminal.

Now, on the continent of Europe, the rôles are precisely reversed. In France, and in those countries which have imitated her, the inquisitorial principle long ago won its way—as a result, they say, of the example of the Roman Inquisition—to recognition as the principle appropriate to criminal procedure.

In civil matters, on the other hand, the mediæval accusatory principle has preserved the authority which, under the influence of the prerogative Court of Chancery, it has long lost in England.

I feel some fear that I shall put a strain upon your credulity if I ask you to continue to believe—what is nevertheless the case—that Egyptian courts were substantially efficient instruments of civil justice, when I go on to speak of certain other deficiencies in Egyptian civil procedure, deficiencies for which we were indebted to our French models, and to the commanding prestige which they had acquired and still retain.

Machinery of Procedure.—One sometimes hears criticisms of the elaboration of our rules of civil procedure and practice; and I believe that some expert authorities are of opinion that those rules could, with advantage, be simplified. But experience of a system which lies at the opposite pole leads one to think sometimes that it is possible to take one's advantages too much for granted, and to underestimate the merits of a strict technical and elaborate machinery of procedure.

In the Franco-Egyptian system there are no pleadings, with the exception of the statement of claim and the notice of appeal; there are no costs, save costs in the cause, determined by a percentage of the value at stake, and saving the normally ludicrously small sums awarded by the court to the successful party for professional assistance. The combined consequence of these two defects, the absence of pleadings and the absence of specific costs for each step in the procedure, is, in the first place, to make it difficult in a cause of any degree of complication to clear the issues, and in the second place, to facilitate the manœuvres of any party who is interested in delaying judgment; the court is largely disarmed in any effort to pin the parties down to specific points, or to defeat the ingenuity of the reluctant suitor. If costs are not available as a purely procedural penalty, the only weapon which remains available with which to penalize negligence, indolence and chicanery is an adverse judgment on the merits; and this is a weapon which judges, particularly in an easy-going world, are naturally reluctant to use.

Perhaps the most useful key to the difference between a good and a bad system of civil procedure is furnished by an idea which in England is fundamental, and for which we owe to the Americans a useful name: the idea of the "day in court." The Anglo-Saxon conception of a properly conducted civil trial is of a proceeding which can be effectively conducted and concluded before a jury, and this model we scrupulously follow, as though it were prescribed by natural law, instead of being, as it is, a very unusual achievement.

Trial by jury requires and presupposes, *first*, that all issues shall be settled and all interlocutory points decided before the trial begins; *secondly*, that all matters of fact shall be fully ventilated, all witnesses heard and all relevant documents read, in open court; and *thirdly*, that the trial once begun shall be carried through continuously to verdict. In those countries where this model is not recognized as the unquestioned standard of proper procedure, experience shows that it is difficult to maintain the principle of the orality of proceedings, and to prevent a civil trial degenerating into a written procedure, conducted in substance by the process of compiling a dossier in the registrar's office, a dossier which the judges will read and consider in private with little assistance from counsel. This procedure will be varied only by occasional short motions in court, by the examination of witnesses, not in open court but in chambers, and by the compilation of written reports by expert referees. A further marked consequence of the absence of the ideal of the day in court before the jury is to attenuate the distinction between the character of the proceedings in first instance and in appeal, and to turn every appeal into a retrial. I need scarcely tell you that it was at all times the earnest desire of English lawyers, who, whether as judges, law-officers or counsel, were brought into contact with this system, whether in the Mixed or the Native Courts, to amend it in the light of what we confidently believe to be our better knowledge. But though the subject was continually agitated, the prestige of French methods, solidly entrenched in the country before England was able to take any effective hand, the influence and authority of the Mixed Court bench and bar, the absence of any simple statement of our principles in an authoritative and codified form, combined in the long run to defeat most of our efforts. There could, of course, be no question of achieving anything save by persuasion, by converting the mind of the legal profession; and the nearest we ever reached to this end was when, not long before the war, after years of debate, pamphlets, public lectures and government commissions, an Italian lawyer of eminence and influence was persuaded to read *Odgers on Pleading and Practice*, a treatise which he perused with equal astonishment and admiration.

Administration of Criminal Law.—Turning now to the administration of the Criminal Law, which, as I have explained, was and is chiefly the business of the Native Courts, we find a system which, though definitely not English in character, was, if viewed practically, and without pedantic prejudice, open to much less serious criticism than that to which the civil practice was obnoxious. The criminal jurisdiction of the Native Courts was started on its way on very fairly satisfactory lines, and, owing to the much greater freedom enjoyed by the Egyptian Government in legislating for its own citizens than for foreigners, it was continually being improved. The substantial law, the rules of procedure and the system of judicial organization, all had the initial advantage of simplicity. It is true that the Egyptian Codes made no provision for juries or for a law of evidence; but these deficiencies in large measure cancelled out. I have, I think, never heard an English judge, experienced in the administration of the criminal law in Egypt, condemn the absence of strict rules of evidence; and this is to be explained not from any affection for the arbitrary methods of the Court of Star Chamber, but for the practical reason that experience showed that there was very little observable danger of the Egyptian judiciary falling into the temptation to give undue weight to second-hand or hearsay evidence.

However that may be, it is certainly the case that in all the schemes of reform which from time to time have been brought forward in Egypt, there has never been any pressure from English quarters to introduce stricter rules of evidence, except in regard to the admissibility of confessions, a point to which English members of the Mixed Court Bar have not unnaturally attached importance when proposals have been made for the extension of the criminal jurisdiction of the Mixed Courts to foreign, including British, nationals.

It will not be irrelevant if at this point I advert to a belief which is widespread that it is a fundamental principle of French criminal jurisprudence that an accused person is presumed to be guilty until he is proved to be innocent. I need scarcely tell this audience that there is no such principle; and the fact that its existence is credited by many people who are not conversant with French institutions affords to the French themselves a subject of merriment. The foundation for the belief is to be found in the two undoubted facts that French procedure authorizes the obligatory examination of any person who is under suspicion, and that the attitude of French criminal courts towards the prisoner at the bar appears to our eyes to be somewhat lacking in patient neutrality. But as we know full well, it is impossible even under our own system, and in spite of the precautions which we endeavour to take to protect people as to whom there is reason to suppose, not necessarily that they are criminals, but that they may or must know something about a crime which has been committed, from being placed, in fact, in the position of being obliged to account for their action and to explain away, if they can do so, any grounds of suspicion which may appear to arise against them. Egyptian criminal procedure frankly recognizes the power of detective and prosecuting authorities to question any suspected person or prisoner at any stage of the proceedings previous to trial; but no prisoner can be examined at his trial without his consent. I have, however, never known of a prisoner claiming the right to refuse to answer a question put to him in court. In respect of the attitude of criminal courts to persons on trial before them, a better tradition of impartiality was established and has been preserved in Egypt than seems to prevail in France; indeed, owing to the inexpertness of the bar in the examination of witnesses, a criminal trial at an Egyptian assize generally consists for the most part in the cross-examination of the witnesses for the prosecution from the bench in the interests of the defence. A singular feature of a typical criminal trial used to be the weakness and ineffectiveness of the evidence for the defence, even in the case of prisoners who ought not to be, and were not, convicted. I am told that a similar phenomenon is to be observed in India.

Trial of Crimes.—An important reform which was carried into effect with general consent in the year 1905, after the Native Courts had been working for about twenty years, related to the trial of crimes properly so called, that is to say, to all offences punishable with death, penal servitude or imprisonment for a term exceeding three years. Under the original system such offences were tried in first instance before the competent provincial court, and on appeal before the Court of Appeal in Cairo. The appeal was not a review but a retrial, on the record; this meant that in a grave or difficult case the final and crucial decision was taken by a court which had rarely heard the witnesses. The reform consisted in the abolition of the double trial, and its replacement by a single proceeding before three judges of the High Court who went on circuit once a month to hold the criminal assize in each of seven principal provincial centres. It is interesting to record that a proposal that the new assize courts should be assisted by lay assessors was condemned by Egyptian legal opinion.

Distribution of Responsibility.—One problem of far-reaching importance continued for many years to perplex the legal advisers to the Egyptian Government, and may do so again if, in consequence of the Treaty now about to be negotiated, the criminal jurisdiction of the Mixed Tribunals is extended to foreigners. It is the problem of the distribution of responsibility, in criminal matters, between the police, the prosecuting authority and the authority who commits for trial. This is a problem in legal organization which presents itself in all civilized countries, and which has perhaps not been finally solved in England. At one end of the chain there must be an authority predominantly concerned with the detection of crime and with the collection of evidence sufficient to justify a conviction. At the other end there must be, or so it is thought in modern times, an authority which, at any rate in the case of serious offences, shall decide in a judicial spirit the question whether the suspected person shall or shall not be committed for trial. Intermediate between the two there is need for an authority which shall look at crime from the standpoint of the public prosecutor, of the Crown lawyer, concerned partly with the duty of keeping the detection on the right lines, and partly with preparing and presenting the case for the adjudication of the criminal court. We may be reminded how modern, even in England, is the problem of the proper conduct of criminal proceedings previous to trial, by remembering that when Mr. Thynne was murdered in the streets of London in 1682, two London magistrates forthwith obtained confessions from the murderers, and themselves appeared in court at the trial to testify to the fact. It is the recent invention of the police which has given us the impartial committing magistrate, and the preparatory trial which takes place before him.

In Egypt, as elsewhere, the duty of detection devolves in the first instance upon the police. Under the assize-court system, of which I have just spoken, the duty of committing for trial, or of refusing to do so, is discharged by a member of the subordinate judiciary, who has nothing to do either with detection or with prosecution, and is only concerned to satisfy himself that there is a prima facie case, relying for the purpose in general on depositions collected in the previous course of the investigation.

The Parquet.—Between these two stands the organization of the Public Prosecutor's department, known by the name of its French model as the Parquet, an organization of official prosecutors of whom one or more are attached to every court throughout the country. The duty of the members of the parquet is not to wait passively to be briefed by the police, but, like the American district attorneys of whom we read in detective novels, it is their business on the one hand to take an active part in the collection of evidence, controlling, superintending and supplementing the work of the police, and on the other to act as prosecuting counsel before the court. Both police and parquet have the power and the duty to preserve a written record of all their investigations. In consequence of the overlapping of the functions of the police and the parquet there has been for many years a perpetual tendency for these two authorities, who belonged to completely distinct and independent organizations, to do the same work in rivalry twice over; and on the other hand there was the constant danger that the prosecuting officers, from being involved in the task of detection, and consequently in more than an advocate's responsibility for securing convictions, would fail to maintain the desirable standard of fairness and impartiality. The department of government primarily responsible for public security, the Ministry of the Interior, was always urging the solution that the collection of evidence should be made the exclusive business of the police. The judicial authorities, on the other hand, were never willing to release this function from all control by members of the legal profession holding quasi-magisterial office. No completely satisfactory solution of the problem has, I think, yet been found. If there is any magisterial control of the detective police, the magistracy becomes itself involved in detection, and in so doing sacrifices some of its neutrality. If you separate the investigating magistrate from the committing magistrate, as you do when you have a coroner's inquest followed by a police-court inquiry, you are in danger of seeing important criminal cases tried three times over.

But I have already made sufficient demands upon your attention. The subject which I have chosen is too large to be dealt with in more than a most fragmentary way in the course of a single lecture, and I have no time to say anything of a wide range of interesting and important topics which came within the domain of the Egyptian Department of Justice, such as, for example, the reform of the penitentiary system, the institution of reformatories both for children and for habitual offenders, the institution of children's courts. The first magistrate who sat—it was in 1905—as judge of a children's court was that gifted and regretted man, Sarwat Pasha, who, twenty-three years later, as Prime Minister, negotiated with Sir Austen Chamberlain a draft treaty between England and Egypt. And let me digress to make the remark that one of the difficulties with which the administration of justice has had to contend in Egypt in recent years has been due to the fact that the judicial bench has been the chief recruiting ground for Ministerial Office; that bench having furnished the principal school in which leading Egyptians have been trained for politics.

English Influence.—English influence began to be brought to bear in an effective manner upon the administration of justice in Egypt by the appointment, in 1891, as Judicial Adviser to Government, of the late Sir John Scott, whose inspiring personality made a profound and unforgotten impression upon the whole administration. The influence exercised by Sir John Scott and the small number of Englishmen who, whether as administrators or as judges, sought to carry on the tradition he had established was directed rather to evolution than to revolution. The policy was never adopted of endeavouring to counteract or to undermine the authority of French law. To have embarked on any such campaign would have been to make war on civilization; for with all its defects, French law is not only a very civilized system, lucid, logical and comprehensive, but, what was equally important, it was firmly established in the understanding and sympathies of the Egyptian people.

Its merits were perhaps chiefly conspicuous in the law of property and contract,[1] and in the domain corresponding to that of the Statute of Frauds. The rôle of the Englishman has chiefly been to assist in securing that this, to him, foreign system, which had already become indigenous, should be properly taught and understood, and then administered with efficiency, independence and impartiality.

English initiative has been responsible on two occasions for projects of far-reaching legal reform in Egypt. Both of these movements were directed rather to reforming the system of judicature, and reducing the multiplicity of jurisdictions, than to promoting any extensive changes in the substantive law. The first of these projects, which contemplated the complete fusion of all the lay jurisdictions in the country, Mixed, Consular and Native, in a single hierarchy under a single Supreme Court, was worked out by a strong commission during the war, under the auspices of the then Judicial Adviser. This far-reaching project suffered shipwreck in 1919 in the storms of politics. The second plan, of more modest scope, and directed only to the absorption of the consular jurisdictions by the Mixed Courts, was prepared in 1920 and 1921 under the auspices of Sir Cecil Hurst, as part of the labours of Lord Milner's Mission. This plan is still in the official pigeon-holes; but, as I have already said, its adoption is contemplated as a desirable and probable consequence of the signature of the proposed Anglo-Egyptian Treaty. No one who is concerned for the better administration of the law in Egypt can hesitate to agree to the absolute necessity of creating a single criminal jurisdiction invested with the power of enforcing Egyptian criminal law against foreign offenders. Legislation relating to the traffic in noxious drugs furnishes a conspicuous and topical example. And no courts are so well fitted to be invested with such a jurisdiction as are the Mixed Tribunals.

It is to be regretted that neither Egyptians nor non-British foreigners resident in the country have yet acquired a saving sense of the defects of Egyptian civil procedure, or have so far appreciated the truth of a judgment which was passed years ago, that the adoption of more effective and peremptory methods for the enforcement of contracts and the collection of debts would be of the greatest benefit to the commercial life of the country, and might not unreasonably be expected to have the effect of lowering the current rates of interest by several units per cent.

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[1] The commercial law is antiquated; the law of tort can barely be said to exist. On the other hand, the Criminal Code, though susceptible of improvement, is admirably adapted by its simplicity for adoption in such a country as Egypt.

SIR JOHN MACDONELL AND THE STUDY OF COMPARATIVE LAW.

[*Contributed by* H. J. RANDALL, ESQ.]

Macdonell as Jurist and Lawyer.—The word "jurist" is one of ill favour to an Englishman. He understands a lawyer even if he dislikes him, but a jurist he does not understand and dislikes him still more. In a little book published soon after the war one of the characters described a jurist (we quote from memory) as "an individual, usually from South America, who perpetually talks of Solon and Lycurgus and can always be squared." Now it must be admitted that the late Sir John Macdonell was pre-eminently a jurist, and one of the greatest of his time. But it may be pleaded in confession and avoidance that he was likewise a sound lawyer. Even if he displayed an unnatural interest in jurisprudence (which, as is well known, is not a proper science at all, but merely a device to annoy those that have to sit for examinations), yet he wrote a perfectly good book on the *Law of Master and Servant.* And if he delighted in things so remote as the legal procedure of the ancient Greeks, still he was a Master of the Supreme Court and could take a sound and intelligent interest in a bill of costs.

In truth his life was a perpetual and strenuous contradiction of the easy assumption that the master of theory could not be eminent in practice. None can deny that the unpractical theorist exists in all walks of life, but his deficiencies are generally those of character rather than of brain. The theorist with practical ability is a most formidable phenomenon in any community.

Macdonell was a Scotsman who happily became enamoured of the prospect of the high road to England. After taking first class classical honours at Aberdeen, he adopted journalism as a calling for a time, but then migrated to the English Bar. The reward of success there was a Mastership of the Supreme Court, the office of King's Remembrancer, a K.C.B.

Despite the encumbrance of professional success, the quantity of his literary work is astonishing. The writer of law books is a well-known and invaluable person, but as a general rule success at the Bar precludes prolific legal authorship. Many of our indispensable companions were written by men who afterwards attained eminent positions in the profession. Fry on Specific Performance, Williams on Executors, Benjamin on Sales are examples from a long list. Usually books of this kind were written early in life by men who became too busy to write anything afterwards. There may have been other Masters who had something like Macdonell's literary output (a fearsome but useful expression) to their credit, but if so they are unknown to the present writer. The work that he undertook was not of the comparatively easy kind, but such as entailed thoroughness, accuracy and heavy drudgery. It is certain that the past volumes of the Judicial Statistics rest in the deep peace that covers old Blue Books. Yet what admirable introductions—accurate, informative, suggestive—Macdonell wrote during the many years that he edited them. Every scrap of information that might be useful to the sociologist or the politician was extracted from them; every tendency noticed and its significance emphasized; the path of the possible reformer indicated. They were certainly appreciated at the time by all who cared for such things, but the historian of the future is the only person likely to read them again. He will have a joyful time when he makes the discovery.

Foundation of the Society of Comparative Legislation.—In addition to this regular annual publication, Macdonell became editor of the new series of State Trials, and contributed a number of articles, chiefly upon subjects connected with International Law, to the eleventh edition of the *Encyclopædia Britannica*. Work of this kind, however well executed, is not likely to keep a man long in remembrance, but the achievements that should keep Sir John Macdonell's name alive are the part that he took in the foundation and working of the Society of Comparative Legislation, and his twenty years' tenure of the only chair of comparative law in the country—the Quain Professorship at University College, London.

The effective founders of the Society of Comparative Legislation were Sir John Macdonell and Sir Courtenay Ilbert. It was started in 1895 and its claims were set forth by Sir Courtenay Ilbert in an article contributed to the *Nineteenth Century* in July of that year. The rather strange name was undoubtedly a diplomatic subterfuge. It would have been a hopeless task to have aroused interest in a society formed to study anything so unpractical and academic as comparative law; but comparative legislation had a useful and practical sound about it. Moreover, it made an imperial appeal. The diplomacy of the founders was admirable. Sir Courtenay Ilbert, an excellent jurist but advisedly reluctant to admit so damaging a fact, began by reading a paper before the Imperial Institute. The Society was then formed with the Lord Chancellor (Herschell) as President, the Lord Chief Justice, the French and American ambassadors and representatives of the principal colonies on the Council. Then Sir Courtenay began his appeal in the *Nineteenth Century* by saying:

"The marvel is that such a society has not long been in existence. The British Empire presents an unrivalled field of observation to students of comparative legislation and comparative law. No monarch has ever formed a constituent part of so many Legislatures as the Queen of England; no court has ever administered so many different systems of law as the Judicial Committee of the Privy Council. Some sixty Legislatures are at work in the British Empire. If we extend our survey to the whole of Greater Britain, we shall find in the United States some fifty more. They offer the greatest variety of constitutions."

And again:

"As to the subjects of legislation, their number bears relation, not, as the Roman historian would have it, to the degeneracy of each State, but to the variety and complexity of its needs. And thus in all the more advanced communities the statute-book increases steadily in volume, and grows to dimensions which tend to make its contents perplexing both to the administrator and to the student. If we pass from the sphere of legislation and statute law to that of common or customary law, the variety of the systems which have to be interpreted and applied by the Imperial Court of Appeal is equally remarkable."

So the artful jurist leads on the practical administrator until he must needs admit that the variety of constitution, statute and custom is bewildering, and that if some order could be introduced into the maze, and some general principles established, it might lighten the task of Empire governance and even prevent awkward and irritating mistakes. And so, when the pill has been nicely sugared over it is possible to hint that the work of the Society might be scientific, and even, but merely as an unimportant by-product, advance the study of jurisprudence.

"The needs which such a society may legitimately endeavour to supply are extremely various. Its subjects are both practical and scientific. It is intended to be of service to jurists and to students of sociology, as well as to practising lawyers, to legislators and to administrators.

"It will apply to jurisprudence the comparative method of investigation, which has already proved so fruitful. It will gather together, epitomize and arrange materials now scattered through many periodicals, or to be found only in official documents, of which few libraries contain copies, and it will endeavour by other means to promote the study of comparative legislation. One of its chief aims will be the collection of information as to the statute law and the forms and methods of legislation in the British Empire and the United States." And, "lastly," quite as an afterthought, the Society will not promote or study, it will merely "not overlook" —"those branches and aspects of its subject which are of interest rather to the student and to the jurist than to the legislator or to the professional lawyer."

A case presented with such tact could not fail to win acceptance. The Society was formed and carried out its objects so well that it has long been recognized as the leading legal society in the Empire. Neither has it "overlooked" the more theoretical aspects of legal science. For a long period of years its excellent journal was edited by Sir John Macdonell. It was in this work as well as in his professional duties that the suggestiveness of Macdonell's mind was so apparent. It was impossible to talk to him for even a short time without imbibing ideas that enlarged one's conceptions and indicated the most productive lines upon which one's studies could proceed. One felt that his published work presented but a small proportion of the content of his mind, and that there was no legal subject that he could touch without enlarging it with new and fruitful ideas. All was given freely without pride of ownership or reservations of copyright, and his inspiration must have been a potent factor in the promotion of legal studies since the opening of the twentieth century.

Progress of the Study of Comparative Law.—The long tenure by Macdonell of the two offices of editor-in-chief of the *Journal of Comparative Legislation* and of the Quain chair of Comparative Law in the University of London are likely to be regarded by the legal historian of the future as landmarks in the progress of this study in England. In the main English law has been marked by a strong, if narrow, self-sufficiency. When the Renaissance ushered in modern history and modern thought, the rebirth of classical antiquity created a presumption of superiority in favour of the products of the ancient world. The massive and logical structure of the Roman law appeared to be the prototype of a legal system fitted for a high civilization, and the feudal and customary systems of the Middle Ages mere relics of barbarism in comparison. The crying need of the time was the repression of feudal anarchy and the Roman law was desired above all things as an instrument of order. So it was "received" in Germany, Holland and Scotland, its predominance was doubly assured in Italy and Spain, and in France the Droit Ecrit gained ground steadily at the expense of the Droit Coutumier. In England (as Maitland proved) the conflict was stern. The mediæval structure of English law survived by reason of its organization and toughness. But it bore the marks of the conflict. The crabbed pedantry of Coke was not merely the mark of a strong narrow mind; it was an attitude of defence. All through the struggle of the seventeenth century the Common Law stood as the main bulwark against Absolutism, and when the fight was won the attitude of defence became the dogma of superiority. The dogma was strengthened rather than tempered by foreign criticism. When Voltaire and Montesquieu vaunted the English system as the ideal of a law of freedom, John Bull could prove his superiority to foreigners out of the mouth of the foreigners themselves. Small wonder then that Blackstone was complacent, Eldon immovable and Bentham for long years a mere voice crying in the wilderness.

Nevertheless there has usually been an undercurrent of varied strength towards some study of comparative law. The differences between the Common Law and the Civil were apparent as soon as a student ventured beyond the Year Books and the Abridgments. The comparisons might take the form of pæans of our law—that was one of the lines of defence—but the method was there. Fortescue's *De Laudibus Legum Angliæ* in the fifteenth century and *Doctor and Student* in the sixteenth are both of that character; and Smith's political treatise *De Republica Anglorum* has a distinctly comparative flavour. Maine suggested that among the sources of English equity were unacknowledged borrowings from the jurists of the Low Countries. All along there existed in our midst the small and exceedingly close corporation of Doctors Commons devoted to the study of the civil law. After the union of the Crowns it could not fail to be known even to members of Parliament that within the island itself there flourished a system that derived its inspiration from Papinian rather than Coke. Yet after all this was an undercurrent, not the main stream; and comparative law never attained an assured position until Maine's *Ancient Law* established the English school of historical jurisprudence. Even then the progress made was generally the work of solitary students after the approved English method. Until the formation of the Society of Comparative Legislation there was no society devoted to the study; and until the establishment of the Quain professorship there was no chair of Comparative Law in Great Britain. Sir John Macdonell, in holding both the chair and the editorship of the Society's journal for a long period in the critical early years of both, was able to impress upon the study his own methods and ideals in a way that was open to none other. The future must show, but to the present writer it seems that the start that he gave is likely to be followed because his foundations were good and true. If so he must always occupy an assured and honourable position in the history of English legal studies.

Macdonell's "Historical Trials."—None of the many series of lectures that Macdonell delivered at University College was published by him in his lifetime. The *Law Times* was happily inspired to print long summaries of many of them at the time, but there is no oblivion so deep as the oblivion of yesterday's newspaper. It was therefore an excellent idea to publish the *Historical Trials*,[1] one of the most striking of the series. We must be grateful for what we have even if we regret that it is not more.

The trials are treated as they have seldom been treated before; from the standpoint of the lawyer, "as legal phenomena, part of the legal history of men, not the least part of the long story of the evolution of the human conscience." The great trials involved issues of morals, of politics, of religion. These matters Macdonell considered too high for him; they are left to the philosopher, the historian and the theologian. A great trial is often a great political event; it is not always remembered that it is a great legal event. No historian of England or India can ignore the trial of Warren Hastings; to the historian of law it is the death-knell of the method of trial called Impeachment.

Eleven trials have been chosen to illustrate the chief systems of procedure. It is easy to criticize any selection on the ground of omission or inclusion. Different persons, within certain limits, would probably make different selections of the fifteen decisive battles of the world; they would also make different selections of the fifteen decisive battles of the law. Marathon and Hastings would appear in every list of decisive battles, and Socrates and Joan of Arc in every list of great trials. Certain names are inevitable, but beyond these everyone will select. To a large extent the area of choice is determined by the paucity of the records. Knowing the supreme importance of the Roman law the reader may be tempted to exclaim that no specimen of a Roman trial has been included. The reason is that no adequate record of any Roman trial exists. For the same reason the selected examples are almost all State trials. After passing so long through the rarefied air of high politics, and keeping company with great personages, the lawyer longs for something mediæval and simple—all the details of a commonplace dispute about a horse or a cow—but he is likely to long in vain. The general outlines we may know, but the petty details which would be so illuminating to us were too familiar to be matters of record.

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[1] *Historical Trials*, by the late Sir John Macdonell, K.C.B. Edited by R. W. Lee, D.C.L., with a preface by the Rt. Hon. Lord Shaw of Dunfermline, LL.D. 1927. (Oxford: at the Clarendon Press.)

So, too, the trials described are all criminal or semi-criminal, and this is a shortcoming that might have been remedied without unduly lengthening the series. If classical and mediæval records do not provide adequate material, it should have been possible to include at least one or two English cases. The lawyer would have been interested and his pessimism tempered. We are given the trial of Mary Queen of Scots from the age of Elizabeth—" the most disgraceful of all the judicial iniquities which disgrace the history of England "—but in the age of Elizabeth Shelley's case was also decided. A critical and comparative account of it such as Macdonell could have given us would have been instructive to the lawyer, and even entertaining to the layman.

Perhaps the deepest impression left upon the reader by this volume is that the idea of a fair trial, at least where passions are aroused, is very modern. The ideal of order precedes the ideal of justice. The first business of legal procedure is to dispose of disputes in a way that will prevent fighting. Justice, like freedom, is a plant of very slow growth.

" There is no accepted test of civilization. It is not wealth, or the degree of comfort, or the average duration of life, or the increase of knowledge. All such tests would be disputed. In default of any other measure, may it not be suggested that as good a measure as any is the degree to which justice is carried out, the degree to which men are sensitive as to wrong-doing and desirous to right it ? If that be the test, a trial such as that of Servetus is a trial of the people among whom it takes place, and his condemnation is theirs also " (p. 148).

If this be true, the *Historical Trials* are a terrible commentary upon the condition of civilizations called high. Possibly in consequence of the selection of prominent trials the colours are overheightened ; the ordinary trial may not have been so bad. Even when all allowances have been made, the fact remains that the ideal of justice is hard of attainment and has seldom been realized. Few men have really just minds, and there can be no justice, national or international, when the element of fear is prominent.

" Fear brings back the primitive conception of the functions of courts ; not necessarily, or indeed often, personal fear, but fear of changes ; fear on the part of the upholders of the old order ; fear of the effects of the discoverers of new truths ; fear of emerging into the full light. Where such fear is justice cannot be ; a court becomes an instrument of power ; judges are soldiers putting down rebellion ; a so-called trial is a punitive expedition or a ceremonial execution—its victim a Bruno, a Galileo, or a Dreyfus " (*Historical Trials*, p. 86).

Comparative Law of Procedure.—In addition to the series of *Historical Trials*, Macdonell was in the habit of delivering a series of lectures on the Comparative Law of Procedure. It is regrettable that this series or a selection from it was not included in the volume. The *Historical Trials* were really a series of illustrations of the principles laid down in the general course. The reader of the volume is consequently under the disadvantage of reading the illustrations without having before him the principles that they are intended to illustrate. The principles appear, but only as incidental observations.

Macdonell held the view that systems of procedure were not fortuitous, much less arbitrary, but partook of the character of natural growths. The legal procedure in vogue among any particular people at any particular time was an essential part of its civilization. It would be as absurd to expect to find such a thing as a reference to a Master in Chambers in the days of Good King Alfred as to find a torpedo boat destroyer in the navy of that illustrious monarch. A people gets the procedure as much as it gets the government that it deserves. It follows that it should be possible to do what no one has yet attempted—to write a Natural History of Procedure, treating the various systems as the outcome of the social conditions in which they grew, and the test of the level of civilization that the community had attained.

Again, the systems of procedure fall easily into main divisions, so that besides a natural history a Grammar of Procedure can be constructed. The leading systems have their definite characteristics. These can be formulated and classified, and a disorderly mass of heterogeneous rules can be exhibited as regular parts of definite systems.

Possibly the task has not been attempted because of its inherent difficulty. It is truly said that it is impossible to obtain a real knowledge of the foreign exchanges from books, notwithstanding the excellence of the books and the first-hand knowledge of the authors. The real knowledge can only come from handling the bills of exchange, from " smelling them " as someone graphically said. It is equally impossible to obtain an intimate knowledge of a system of procedure from books and documents. In every system there is a mass of unwritten convention, the things that are done and the things that are not done. The records of trials, when they exist, are extremely valuable, but even with their aid we can hardly be certain that we have caught the real spirit of the systems that are dead. The efficiency of a particular system may depend upon something so intangible as the cordiality of the relations between the Bench and the Bar. Macdonell tells the story of a conversation between himself and a German lawyer who had come to this country to study English procedure at first hand. Macdonell asked him his opinion after a careful examination of its working. " Most admirable," was the reply. " Would you recommend its adoption in your own country ? " " No." " Why not ? " " Because the system presupposes a degree of confidence by the Bench in the Bar which could not be safely assumed in Germany."

The variety of the forms of procedure is immense, but they tend to simplify as civilization advances. Yet the dream of an universal legal process is a fond thing vainly imagined, just as the dream of an universal language. Trial by jury, the vaunted palladium of English liberties, has but a precarious foothold in the civil law countries, because it seems unsuited to the genius of the Latin peoples. In older lands it may be unsuitable from other and unexpected reasons. It was once explained to a progressive European why its introduction would be impossible in China. As things stood the litigant had to bribe the judges, the advocate on the other side, and his witnesses. If both sides had to bribe twelve jurymen as well the cost of litigation would become absolutely prohibitive.

Apart from what it is now the fashion to call national psychology, the chief cause of the variety of procedure is the development of the idea of its purpose. One conclusion, as we have already said, that stands out in the series of *Historical Trials* is the late growth of the ideal of fairness. In all earlier ages, such a notion, if conceived at all, was dimly present in the background. The primary conception was the preservation of order; to mitigate violence, to qualify the blood-feud, to diminish self-help, to persuade men to submit themselves to the arbitrament of a legal decision rather than to trust to the strength of their own right hands. The substance of the decision matters little, the vital thing is that there should be a decision that the parties can be persuaded or compelled to accept. So we get the spectacle of the judge presiding over a dog-fight just to see that the rules are observed and that the best side wins, for all the world like the umpire in a game. Even now no litigant really desires a fair trial. He wants to win the case, to beat the other man, to 'get there.' He may be civilized enough to fight like a sportsman, but his main object is to win.

Nevertheless the idea of righteousness is never entirely absent from the human mind. The history of procedure could well be written round the development of that idea. Justice first appearing as a thin trickle between the fierce contest of passions, then little by little gathering strength, and finally appearing as the full force of the stream. Macdonell was not wrong in projecting the history of procedure upon the history of civilization.

Rationalization of Procedure.—Concurrently with the process of the moralization of procedure its rationalization advances. Law is long in losing its early association with religion. To go no further than our own legal history we see the ordeal, or the direct appeal to the divine powers, abolished by the first movement of a rationalizing theology. The Bishop soon removes himself from the county court, because it is felt to be improper that an officer of the Church should concern himself in the shedding of blood; but he entrenches himself strongly in the courts Christian, and wages long and bitter battles with the King's justices to enlarge, and afterwards to defend, the limits of his jurisdiction. Not until 1857 are the ecclesiastical courts finally confined to ecclesiastical causes. So for centuries the Lord High Chancellor, the King's highest judicial officer, is of necessity a Churchman. Only by slow stages are lay lawyers tentatively admitted to the office, and by slower stages still obtain a monopoly of it. He is the Keeper of the King's conscience, and how can a layman who knows no casuistry be a proper judge in matters of conscience?

The taboos persist longer still, they have not yet disappeared. The oath is still with us, and so is the law of evidence. The oath is no longer decisory, it is merely an added solemnity for a witness, and is thought to give some slight security that he will not depart too far from the truth. The law of evidence has been very slowly rationalized. Newman once astonished Huxley by exclaiming, "as if evidence were the test of truth." But Newman was only projecting into the unfavourable scientific atmosphere of the nineteenth century, an idea that would hardly have been questioned in the ninth. Readers are now astonished that neither Mr. Pickwick nor Mrs. Bardell, the only persons with first-hand knowledge of the matter, could give evidence at all in the famous case. The nineteenth century was nearly over before an accused person in a criminal trial was able to offer his own testimony on his own behalf. We can now give excellent reasons for our rule that "what the soldier said is not evidence," but it originated not in reasoning but in taboo.

At one end of the long process we can see the priest-king declaring the dooms of God that pass all understanding; at the other the commercial arbitrator sitting in a City office, and endeavouring to do substantial justice by methods that would make even Lord Mansfield stare.

Macdonell's Lectures on Comparative Law.—It would be fascinating to follow Macdonell further in the history and grammar of procedure—in the present writer's opinion his most original and distinctive contribution to jurisprudence—but it would be out of place on the present occasion. A few words may, however, be added upon some of his other lecture courses. One of the things that stand out from them prominently is the orderliness of his mind. There are probably more people with untidy minds than with untidy persons. The ability to reduce a complicated subject to order, to disentangle the general principles from the mass of details, to subordinate the matters of lesser importance to the greater, is a very rare quality. Macdonell possessed it in an eminent degree.

A short, but most suggestive course was entitled "Comparative Law since Maine." Like all new sciences Comparative Law was long in defining its position and limiting its content. Some writers treated it as equivalent to the philosophy of law, others as a scheme of what law should be. All new studies are apt to exceed their jurisdictions, or, in homely language, to bite off more than they can chew. Macdonell insisted that the proper method was to follow the other comparative sciences, such as comparative biology and comparative philology. Men are more wary than they used to be about drawing analogies between the development of a society and that of a living body, but between the growths of law and language the analogies are many and close.[1] The object, therefore, should be to adopt a natural rather than an artificial classification of legal phenomena, to advance from the system of Linnæus to the system of Jussieu. The method involves a survey that is world-wide, and as far back in time as records are extant. It is not now sufficient to compare the Roman and the Common Law, but jurists, like biologists, must recognize the lower forms. Yet the comparisons must be made between societies in the same stage of civilization ; it would be entirely misleading to compare a pastoral patriarchal society with a commercial state. Macdonell contends that if we make our comparisons after this manner we shall find in law the equivalent of correlation of structures in anatomy, *i.e.* like structures performing like functions.

This series of lectures enabled Macdonell to develop his views upon the tendencies of modern jurisprudence. Of these by far the most important is the influence of the idea of Evolution. " Ancient Law " was published in 1861, but was based upon lectures delivered at Cambridge at earlier dates. Consequently Maine makes no direct reference to the work of Darwin, but his famous formula of " Status to Contract " is distinctly evolutionary in conception. The idea was in the air. His work was part of that wonderful outpouring of creative thought during the " quinquennium of Darwin " that the present writer has designated the intellectual revolution of the nineteenth century.[2]

Maine may be said to have created the historical school of law in England, and the differences between the ' first rapid alignments ' of the pioneer and the detailed surveys of the later workers are a good measure of the progress of the studies. Prehistoric anthropology was in its infancy when he wrote. The patriarchal society that he regarded as primitive is by us considered as relatively advanced. The Twelve Tables, his standard example of early law, is now revealed as a comparatively late document in the long vista of civilization. To Maine, as to his contemporaries, Greek law was utterly overshadowed by the majestic structure of the law of Rome; but it is now realized that in many respects it was the more advanced of the two. To this alteration in the point of view Macdonell himself contributed in no small degree, and his lecture on "The Place of Greece in Jurisprudence and Legal History" is a landmark in the study of the subject. Celtic law, Hebrew law, Chinese law, and the code of Hammurabi have all been investigated to advantage since Maine wrote; and at the other end of the succession the really primitive systems have been carried back to the furthest possible limit in Spencer and Gillen's wonderful work on the surviving stone age peoples of Australia.

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[1] *Vide* the excellent remarks of Miraglia, Comparative Legal Philosophy (translated in Modern Legal Philosophy series), p. 110.

[2] *Edinburgh Review*, Jan. 1929, p. 41.

Psychological Jurisprudence.—These things are developments of Maine's work on his own lines, but two movements of some importance have enlarged the conception and method of comparative law since he wrote. The first is psychological jurisprudence. In 1917 it appeared to Macdonell to be rather a promise than a reality, but a good deal of important work has been done since then. The inquirers start from the admitted position that ancient law originated in custom; but they seek the efficient cause of obedience to law in the processes of the mind rather than in external sanctions. They talk of "certain impulses to order that have led to the foundation of legal institutions." They go back to Hume's position that "it is on opinion only that government is founded," and they seek to discover in the operations of the mind how that decisive opinion is formed and maintained. As a result they seek for the origins of law far beyond the boundaries of jurisprudence, in magic, in religion, in totemism, in economic necessity; and they find that Pollock was eminently right in saying that "law is enforced by the state because it is law; it is not law merely because the state enforces it."

Sociological Jurisprudence.—The second of these extensions of the sphere of jurisprudence may be treated as an aspect of the first. It is called sociological jurisprudence. It seeks the social conditions that are requisite to produce, first, customary, and afterwards, enacted law. It regards the law as one of the aspects of a wider science of society. Perhaps its conclusions are characterized by vagueness rather than precision; but further research may produce more useful results. All these developments can be brought under the single formula of the relativity of law. The precision of Austin in law, like the precision of Ricardo in economics does violence to the facts, however excellent it may be as a mental exercise. Law is not a thing in itself but an aspect of human life, and therefore relative to all other manifestations of human activity.

Property in Comparative Law.—There is only space left to mention one of Macdonell's other lecture courses—the extremely suggestive one on " Rights and Duties attaching to Property considered from the point of view of comparative law." It was one of the last that he delivered and certainly not the least important. A summary of it would have made a valuable addition to the volume of essays on Property edited by Dr. Gore (then Bishop of Oxford) and published in 1915.

The law of property is a reflexion of the social structure of the society in which it exists. The result is that actual property systems are plastic and varied. No generalization will cover the whole subject, and great harm may be done, and has often been done, by attempting to apply the European categories to hunting or pastoral tribes in Africa and elsewhere. The Roman lawyers bequeathed to modern Europe the idea of one normal form of property—dominium or absolute individual ownership. Even so, the Roman proprietor was subject to a number of restrictions imposed by law, and a number of semi-legal ones imposed by the Censor as the organ of a kind of equity. The Roman idea of dominium could not be applied to the feudal system without considerable modification, because the absolute individual owner did not exist. It was as difficult to find ownership under feudalism as to find sovereignty in a federal state, and for the same reason, because both were attempts to apply an over-simplified theory to facts that it would not cover.

The highly individualistic theory of property was part and parcel of the individualistic theories of the eighteenth century which inspired the French Revolution. That theory has since been strongly and bitterly attacked ; but the paradox is that contemporary with the attack upon the extreme theory of property—" I can do whatever I like with my own "—is the growth of new forms of property.

" Nothing," said one English judge in the eighteenth century, " can be an object of property which has not a corporeal substance." Even Bentham limited property to natural objects, though English lawyers had long recognized under the name of incorporeal hereditaments proprietary rights that had ' only a mental existence.' As

Blackstone said, "their extension is only in idea and abstracted contemplation, though their effects and profits may be frequently objects of our bodily senses." The growth of new kinds of property is shown by the fact that neither the courts nor the writers knew quite what to do with them. They did not fit into the accepted rubrics. Patents, Copyright, Trade Marks, Trade Names, and Goodwill could hardly be swallowed by Contract, 'that greediest of legal categories,' yet there was great reluctance to classify them as property. If anything exists 'merely in idea and abstracted contemplation' it is goodwill; but when a company can issue a balance sheet with that item valued at more than a million pounds sterling, the law must recognize that it is faced with a new proprietary right.

But if the forms of property are more numerous, the restrictions upon the user of property have increased, are increasing and are not likely to be diminished. The maxim *sic utere tuo ut alienum non lædas* has been extended to dimensions that earlier authors would never have contemplated. The long struggle against entails, and the equally long fight against the 'dead hand' are ancient examples of a principle that is now being formulated as the unsocial use of property. The principle of the Ancient Monuments Protection Acts has been widely adopted. Commons are being brought under regulation not in the interests of rights of pasturage, but as open spaces for the use of the public in general. Restrictions have been placed upon the sale of works of art to foreign purchasers, notably in Italy. Town planning is an attempt to secure orderly development by the restriction of proprietary rights. One of the latest developments is the regulation of advertisements in the interests of public amenity. The anti-trust legislation in the United States is an attempt to restrict the misuse of large aggregations of capital.

Modern tendencies may perhaps be summarized as increasing development coupled with increasing restriction.

So we must take our leave of one of the most original and inspiring legal thinkers of modern times.

CIVIL LIABILITY IN THE LAW OF SOUTH AFRICA FOR THE WRONGFUL CAUSING OF DEATH.

[*Contributed by* WALTER POLLAK, Esq., M.A., LL.B., S.J.D., *Lecturer in Law in the University of the Witwatersrand, Johannesburg, Advocate of the Supreme Court of South Africa.*]

Damages under Roman Law and Germanic Custom.—The common law of South Africa is the Roman-Dutch law, which is a compound of Germanic custom and Roman law. In some branches the Germanic element is the more conspicuous; in others the Roman element predominates. In the law of Delicts it is the Roman law which is, in general, the foundation upon which the courts have built.[1] The *actio legis aquiliæ* and the *actio iniuriarum* are the corner-stones of the South African law of Delicts. With *iniuriæ* we have no concern in the present article and we pass on to consider the aquilian action. It was one of the requisites of this action that the plaintiff should have suffered *damnum, i.e.* damage estimable in money.[2] If a freeman was killed and his relatives wished to obtain damages from the person who had wrongfully killed him, they were faced with the difficulty that *in homine libero nulla corporis æstimatio fieri potest.*[3] Accordingly "the Romans did not impose any liability for compensation in case a freeman was killed, although in such cases heavy loss might have resulted from his death to other persons (his wife and children)."[4] In Roman law therefore the dependents of a man who had been wrongfully killed could obtain no pecuniary redress; nor were the heirs of the deceased in a better position. It is obvious that this rule of the Roman law was one which must have caused much hardship, but the Roman jurists were never able to overcome the obstacle imposed by the conception of *damnum* and the impossibility of *liberi corporis æstimatio.*[5]

The Germanic peoples were not troubled by any such legal difficulties. From earliest times the life of a freeman had a value capable of being estimated in cattle or money.[1] Matthæus, one of the great authorities on the Roman-Dutch law, discusses the origin of this rule and of the action founded on the wrongful death of a freeman and says[2]: *Dicamus nunc de transactione, quæ moribus inter cædentem et proximas personas cæsi fieri solet. Eam Sunium et Sonium et Sonam maiores nostri vocarunt: a Sonen vel Suonen, quod est transigere, redire in gratiam. . . . Mos autem ille transigendi apud nos antiquissimus est, nec eum ex iure Romano expressimus, sed a maioribus traditum per manus accepimus. Ad eum enim iam olim, antequam legibus Romanis uteremur, Tacitus respexit, cum de moribus Germanorum ait; Suscipere tam inimicitias seu patris seu propinqui, quam amicitias necesse est. Nec implacabiles durant, luitur enim etiam homicidium certo armentorum ac pecorum numero, recipitque satisfactionem universa domus, utiliter in publicum, quia periculosiores sunt inimicitiæ iuxta libertatem. . . . Cur autem maiores nostri transactiones admiserint, ex Taciti verbis modo adductis intelligimus: cum enim inimicitias propinquorum suscipere necesse esset, periculosissimum id futurum erat reipublicæ, nisi admitterentur satisfactiones. Ac licet hodie inimicitias alterius suscipere nemo tenetur, transactionum nihilominus formulæ et solennia perdurant.* It is clear from this passage that the principle of compensation for causing the death of a freeman is rooted in old Germanic custom and was evolved in order to satisfy the social interest in establishing and maintaining peace and order in the community.

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[1] See Wessels: *History of the Roman-Dutch Law*, p. 706.

[2] See Grueber: *Lex Aquilia*, p. 233; Glueck: *Pandecten* 9.2.702; *Edwards* v. *Hyde*, 1903, T.S. 381.

[3] Digest, 9.3.1.5.

[4] Grueber, p. 17; and see Vinnius: *Commentary on the Institutes*, 4.3. pr: "occiso homine libero non agitur ex lege Aquilia, quia liberi corporis nulla est æstimatio"; and Glueck, 9.2.702: "Die Klage aus den Aquilischen Gesetzt findet daher nicht statt, wenn ein freier Mensch widerrechtlich getoedet worden ist. Denn hier ist keine Schaetzung, und also kein Ersatz moeglich."

[5] See judgment of De Villiers, J.P., in *Union Government* v. *Warneke*, 1911, A.D. 657, at pp. 670 to 671.

Liability under Roman-Dutch Law and Modern South African Law.— Though with the progressive strengthening of the authority of the state the possibility of blood feuds became less and less, the principle was maintained because it obviously satisfied the social interest in the security of the individual life. This interest is one of the most important which the law has to secure, and the Roman-Dutch law secures it not merely by the sanction of a criminal prosecution but also by the award of damages against the person who has wrongfully infringed this interest. In addition to and equally as important as this social interest is the individual interest in the advantageous relation which exists between parent and child, husband and wife, etc. This is in effect an interest of substance and it is infringed when one party to the relation is killed. The Roman-Dutch law and the modern South African law give ample security to this individual interest by means of the action which is the subject-matter of the present article. It is hardly necessary to point out that the English common law contents itself with the criminal sanction and that it has needed the intervention of Parliament to remedy this undoubted defect of the common law.[3]

Upon the reception of Roman law into the Netherlands the Dutch jurists were faced with the problem of fitting the principle of *soengeld*

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[1] See judgment of De Villiers, J.P., in *Union Government* v. *Warneke*, 1911, A.D. 657, at pp. 670 to 671.

[2] De Criminibus, 48.5.7.5 and 6.

[3] See Lord Campbell's Act, 9 & 10 Vict., c. 93.

(as the compensation for the death of a freeman was called) into the framework of the Roman law of Delicts. They solved the problem by treating *soengeld* for all practical purposes as an extension of the *lex Aquilia* and by making the principles of liability under the *lex* applicable also to the case of causing the death of a freeman.[1]

It is in the form of an equitable extension of the *lex Aquilia* that the principle of compensation for causing the death of a human being has become part of modern South African law. "Our law," said Innes C.J.,[2] "while recognizing no right of action on behalf of the deceased's estate, gives to those dependent on him a direct claim, enforceable in their own names, against the wrongdoer. This is a right not derived from the deceased man or his estate, but independently conferred upon members of his family. . . . While on the one hand it resembles the ordinary action for personal injury in that it is based upon *culpa*,[3] and while the breach of duty essential to its existence is the breach of a duty owed at the time of the wrongful act to the injured man; yet, on the other hand, the compensation claimable under it is due to third parties, who do not derive their rights through his estate, but on whom they are automatically conferred by the fact of his death. The action is one *sui generis*."

Facts to be Established before Damages are Awarded.—It is essential to bear in mind these words of the learned Chief Justice if one is to understand the subsequent development of this principle in the South African case law. On analysing the statement of the Chief Justice one finds that the following facts must be established before a person who has caused the death of another can be mulcted in damages:

(1) The death must have been caused either intentionally or through the negligence of such other person.[4]

(2) The plaintiff must stand in some peculiar relation to the deceased *i.e.* he must be "dependent" on him.

With the first of these facts it is not necessary to deal since proof thereof depends upon the ordinary law of intentional or negligent conduct resulting in injury to another. With the second we shall deal later. The peculiarity of this action is, as pointed out by the Chief Justice, that whereas the duty of care, the breach whereof is essential to the existence of the remedy, is a duty owed to the deceased, the compensation is claimable by the dependents of the deceased in their own right and not in any representative capacity, and the measure of compensation is, as will be pointed out later, determined in accordance with the pecuniary loss which the death has caused to the dependents. The position may be thus summarized. X owes a duty of care to A. X negligently fails to perform that duty with the result that A is killed. As a result of A's death B, a " dependent " of A, suffers damage in that he is deprived of A's support. B has a right of action against X. A's estate has no right of action since *actio personalis moritur cum persona.* X was under no duty to B, yet he is liable to compensate B.

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[1] See Voet: *Commentary on the Pandects*, 9.2.11; *cf.* Glueck, 9.2.702; and see *Jameson's Minors* v. *The Central South African Railways*, 1908, T.S. 575, at p. 584; *Union Government* v. *Warneke*, 1911, A.D. 657, at p. 672; *Union Government* v. *Lee*, 1927, A.D. 202, at p. 221.

[2] In Jameson's Minors case, at pp. 582 to 584.

[3] Or *a fortiori*, upon dolus.

[4] Negligence, of course, presupposes a duty of care owed by such person to the deceased. As to when such a duty arises, see *Cape Town Municipality* v. *Paine*, 1923, A.D. 207.

Agreement to Accept Risk of Injury not Binding on Dependents.—The peculiar nature of this action has certain important results. If, for example, A contracted with X that he would not sue X for any injury caused by X's negligence this does not prevent B from succeeding in an action against X for negligently causing A's death. In *Jameson's Minors* v. *Central South African Railways*,[1] Dr. Jameson was a passenger on defendants' train. He travelled on a free pass in terms of which he undertook to accept all risk of injury to himself, however caused. Owing to defendants' negligence he was killed and his minor children brought an action against defendants. It was held that they were entitled to succeed notwithstanding the undertaking of the deceased to accept all risk of injury. In deciding this matter Innes C.J. pointed out[2] that an agreement to accept all risk of injury, however caused, amounted at most to an undertaking not to make any claim in respect of such injury. The duty to take due care remained, but no damages could be claimed by the contracting party for the breach thereof. The children were, however, in a different position. Their action did not come to them either directly or indirectly through their father's estate and there was therefore no logical ground for holding that it could be affected by his contractual relationship with the defendants.

A somewhat similar problem arises in the case where the principle of *volenti non fit iniuria* would have prevented the deceased had he lived from recovering damages. The question was raised in *Union Government* v. *Matthee*,[3] but the Court, finding on the facts that the deceased had not been *volens*, deliberately left it unanswered. It would seem to follow from *Jameson's Minors* case that the answer depends on whether the principle of *volenti non fit iniuria* relieves a person of the duty to take care towards the other who is *volens* or whether it merely deprives that other of his remedy of damages, leaving the duty to take care unimpaired. It is submitted that a proper appreciation of the social interests at stake must lead to the latter view. The principle of *volenti non fit iniuria* is only recognized within very narrow limits by the criminal law, thus shewing that the duty to take care remains. If the view now put forward is correct it follows that in an action of the type discussed in this article it would be no defence for the defendant whose negligence had caused the death of the deceased to prove that the deceased himself, had he lived, would have been without remedy because of the principle of *volenti non fit iniuria.*

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[1] 1908, T.S. 575.

[2] *Ibid*, at pp. 588 and 589.

[3] 1917, A.D. 688.

Deceased's Contributory Negligence no Bar to Recovery of Damages.—Another very important result of the peculiar nature of this action is exemplified by the case of *Union Government* v. *Lee.*[1] Dr. Lee was killed in a collision with defendants' train, and his widow and minor children brought an action against the defendants. The jury found that the death was caused by the joint negligence of the deceased and of the defendants. It is quite clear that had Dr. Lee been merely injured and not killed he would not have succeeded in obtaining damages against the defendants.[2] The question which the court had to decide was therefore whether the dependents' claim could be defeated by proving that the deceased's own negligence had contributed to his death. The Chief Justice, in discussing this matter and after pointing out that the death was due to the joint negligence of the deceased and of the defendants, said:[3] "That being so, the chain of causation between the negligence of the Administration and the death of the deceased remains intact. The negligence of Dr. Lee would no doubt have been an answer to any claim for damages by him, if he had been injured but not killed. Because, on the facts as found, his *culpa* would have contributed to the accident and he would have been claiming for damages which he had partly brought upon himself. Even so, the fact would remain that the negligence of the Administration was an equally contributory cause of the accident. The onus of proving that a plaintiff has been negligent is on the defendant and if he discharges it by proving, not that the plaintiff's negligence caused that damage, but that the joint negligence of both parties caused it, then his own *culpa* remains an established fact for which he would be liable to another plaintiff injured thereby, but not himself guilty of *culpa* at all. The widow of the deceased in a case like the present is such a plaintiff. She had been injured by the joint negligence of the Administration and her husband and it cannot be said that she is in any sense or to any degree the author of her own wrong, because there has been no *culpa* on her part. And I can see no ground of principle on which her husband's *culpa* can be set up against her." Though the decision in this case did not meet with unqualified approval from the lawyers of South Africa the conclusion reached is undoubtedly correct. Once it is clear that the right to get damages for the death of a human being is in no way derived through the deceased nor from his estate, but is an independent right vested in his dependents, it follows that the fact that the deceased's negligence was a joint cause of his death is irrelevant. The defendants' negligence was an efficient cause of the death, and the deceased, had he lived, would have been barred from recovering damages not because the defendants did not cause his injury but because his own conduct was an equal cause and consequently the principle of *culpa* compensation would have applied.[4] It is well established law that if the negligence of two persons concurs in doing damage to another person each is liable jointly and severally for the whole.[1] The position of Dr. Lee's widow and children is analogous to that of such other person. They were damnified by the concurring negligence of the deceased and the defendants, and there seems to be no reason why the analogous rule of the joint and several liability of two persons whose concurring negligence causes damage to a third should not apply to their case.[2] The position is of course totally different where the negligence of the deceased was not merely a concurring cause of his death but was, in law, the sole efficient cause thereof, even though there was in fact also negligence on the part of the defendant. In such circumstances the dependents cannot succeed in recovering damages for the obvious reason that the defendant did not cause the death.[3]

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[1] 1927, A.D. 202.

[2] See remarks of Innes C.J., *ibid*, at p. 223.

[3] At pp. 223 and 224.

[4] See per Gardiner, A. J. A., *ibid*, at p. 227.

Persons who may bring Action for Damages.—In analysing the statement of Innes C. J. in the *Jameson's Minors* case it was said that one of the facts which had to be proved before a person who through *dolus* or *culpa* had caused the death of another could be held liable in damages was that the plaintiff stood in some peculiar relation to the deceased. It is now necessary to consider what that relation is, or, in other words, who are the persons who may bring an action of this type. In discussing this matter in *Union Government* v. *Warneke*,[4] Innes J. A. said[5]:—" With regard to the particular form of *utilis actio* of which the plaintiff desires to avail himself,[6] the authorities allowed it only to near relatives who were dependent in whole or in part on the deceased for support. And they give full effect to the principles regulating claims for damage under the *Lex Aquilia*,[7] because the only cases in which they recognize the action are cases in which the deceased was under an obligation to support the claimant. They do not as a rule make special reference to this obligation, because the relationship of the parties imports it. For they deal in terms only with the claims of the wife, children or parents, to all of whom of course the deceased owed a legal duty. Yet some of them made special reference to the existence of this duty. Matthæus (*De Crim.*, 48.5.11) says that the action is competent to the spouse, the children and others whom the deceased man was bound to support. And Vinnius (*Inst.* 4.3.1) gives it to those whom the deceased was wont *ex officio* to maintain. So that in all the cases actually mentioned in the books, the right of the claimant to demand assistance was a right of property, the deprivation of which by the *culpa* of the defendant would quite naturally found a claim for patrimonial damages. I can find no authority for the proposition that the law of Holland would have given an action of this nature to any relation not damnified by being deprived of benefits supplied by the deceased under a legal duty to do so." It is clear therefore that the only persons who may bring an action of the type under discussion are those to whom the deceased was legally bound to render support. The Roman-Dutch law and the modern South African law recognize that parents must support their children and children their parents.[1] The duty of the parents continues until the children have sufficient means to maintain themselves, and, even after the children have reached that stage, the duty revives if the children fall into distress and are unable to maintain themselves.[2] Accordingly it has been held that a major son, who having been incapacitated during the war was unable to maintain himself, could sue the person whose negligence had caused the death of his mother who, but for her death, would have supported him.[3] The converse case of a parent bringing an action for damages against a defendant whose negligence caused the death of his child occurred in *Bertram* v. *The Central South African Railways*.[4] The child was aged nine, and it was held that his present services were so small as not to be estimable in money and that the possibility of the child's being called upon to support the parent in the future was too conjectural to allow of its being considered *damnum*. Accordingly it was held that the plaintiff could not succeed, but it is clear that in an appropriate case a parent could recover damages. The reciprocal duty of support extends beyond parents and children to grandparents and grandchildren and further ascendants and descendants.[5] No case has yet occurred in which a grandparent or a grandchild has brought an action of the type under discussion, but there can be no doubt that such an action is competent. In the collateral line the reciprocal duty of support extends to brothers and sisters but no further.[6] Here too there is no reported case in which this duty has formed the basis of an action for the negligent causing of death, but there can be no question but that such an action is available. The case which occurs most frequently in practice is that in which the widow and minor children of a man who has been killed through the negligence of another person bring an action against that person. All the authorities are agreed that such an action is competent to them.[7] It is clear that a man is bound to support not only his children,[8] but also his wife,[1] and it follows therefore that they have a right of action against anyone who through negligence has killed their father and husband. This right has frequently been recognized in South Africa, as is shewn, for example, by the cases of *Jameson's Minors* and *Lee*, which have been referred to already.[2] The case of a husband suing for damages for the negligent causing of his wife's death was not apparently considered by the old authorities [3] but came up for decision in *Warneke's* case where it was held that the husband had a right of action. In this case plaintiff based his claim on the ground, *inter alia*, that by his wife's death he had been deprived of the personal exertions and assistance of his wife in connexion with the supervision, maintenance and education of the children. Innes J. A.[4] pointed out that the wife was under a legal duty towards her husband to render such assistance, and it was held that the loss thereof constituted such *damnum* as to give the husband a right of action. It is obvious that the husband would *a fortiori* have a right of action where the wife actually supported him. One may sum up this branch of the topic by saying that an action for the wrongful causing of the death of a human being will lie at the instance of any person to whom the deceased was under a legal duty to render support, whether in money or in domestic services.

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[1] See *Greenshields* v. *South African Railways*, 1917, C.P.D. 209.

[2] In *Mancho* v. *South African Railways*, 1928, A.D. 89, the facts were similar to those in Lee's case and a similar conclusion was reached.

[3] See *Jordaan* v. *Central South African Railways*, 1909, T.S. 465.

[4] 1911, A.D. 657.

[5] At p. 666.

[6] In this case plaintiff sued defendants for damages sustained by reason of the death of his wife through the negligence of defendants' servants.

[7] *I.e.* damnum or loss estimable in money must be proved; see note 2, p. 203.

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[1] See Van Leeuwen: *Commentaries on the Roman-Dutch Law*, 1.13.7; Voet, 25.3.8; *In re* Knoop (1893), 10, S.C. 198.

[2] See *In re* Knoop, *supra*.

[3] See *Young* v. *Hutton*, 1918, W.L.D. 90.

[4] 1905, T.H. 234.

[5] See *Ford* v. *Allen*, 1925, T.P.D. 5.

[6] See Van Leeuwen, 1.13.7.

[7] See Grotius: *Introduction to Roman-Dutch Law*, 3.32.2; Wissenbach: *Commentaries on the Pandects* 35, 19; Groenewegen: *De Legibus Abrogatis: Ad Inst.*, 4.5.1; Van Leeuwen, 4.34.14; Voet, 9.2.11; Van Der Linden: *Koopmans Handboek*, 1.16.2.

[8] See *In re* Knoop, *supra*.

Principles upon which Damages are Awarded.—It remains to consider the principles upon which damages are awarded in an action of this type. The courts have laid down that no damages will be awarded as a *solatium* for the mental anguish which the death has caused to the dependents.[5] This rule is merely an application of the general principle in regard to damages under the *Lex Aquilia* which requires proof of damage estimable in money before a plaintiff can succeed.[6] In *Warneke's* case plaintiff based his claim on the ground, *inter alia*, that through the death of his wife he had been deprived of her comfort and society, but the court refused to uphold his claim on this ground. "The loss of the comfort and society of a wife," said Lord De Villiers C.J.,[7] "does not appear to me to be a pecuniary loss at all. It is a deprivation which in many cases transcends, in the grief, distress and discomfort which it occasions, any other loss which a man can sustain, but it is not a loss which, for the purposes of compensation, as distinct from retribution, is capable of being calculated in money." In the judgment of Innes J. A., the following words appear:[1] "The loss of a wife's comfort and society (as distinguished from her support and assistance) is a loss which only affects the feelings, and not the property of the husband. It is not a material loss, however deeply felt, and affords no ground for patrimonial damages."[2] Protection from mental anguish is an interest of personality and is, therefore, not secured by the *Lex Aquilia* (or its equitable extension) which concerns itself only with interests of substance.

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[1] See Voet, 25.3.8.

[2] A child *en ventre sa mère* at the time of his father's death also has a right of action against the person whose negligence caused his father's death. This follows from the principle that a posthumous child is to be considered as born at the time of the death of his father, if such a fiction be to his advantage; see Voet, 1.5.5, and *Chisholm* v. *East Rand Proprietary Mines Limited*, 1909, T.H. 297.

[3] See per Innes J. A., in Warneke's case, at p. 664.

[4] At pp. 667 to 669.

[5] See *Waring and Gillow Limited* v. *Sherborne*, 1904, T.S. 340; *Union Government* v. *Warneke*, 1911, A.D. 657; *Hulley* v. *Cox*, 1923, A.D. 234.

[6] See note 2, p. 203.

[7] At p. 662.

As *solatium* is thus ruled out, the only element which the courts will take into account in awarding damages to dependents is the actual pecuniary loss which the death has occasioned them. It is not always easy to determine the amount of such loss and the courts have contented themselves with laying down certain broad principles to guide them in reaching a fair estimate. In *Jameson's Minors* case Innes C.J. after coming to the conclusion that the plaintiffs were entitled to succeed said:[3] "There only remains the question of damages, and it is one of the most difficult points in this case. The general principles which should guide us are plain. I need only refer to Voet, who lays down the rule very clearly. He says (9.2.11.): 'According to the modern practice the scope of this action'—that is, an action by the widow or children of a man who has been killed through the default of another—'has been extended, in as far as an action is now allowed to the wife and children of any husband or father killed through another's default, for such damages as the equity of the judge will determine, account being taken of the maintenance which the deceased would have been able to supply, and had usually supplied, out of his labour, to the wife and children, or to other near relatives.' I do not think that Voet intended to restrict, or that we should restrict, the word 'maintenance'—*victus*—to the supply of mere necessaries of life. It must include all the material advantages, conveniences, comfort[4] and support, which the father would have afforded the claimants, but for his death. The language used shews that the court must pay regard to what the deceased had been used to supply in the past—that is, to the station in life of the parties, and the comforts, conveniences[4] and advantages to which they had been accustomed. Only actual material loss can be taken into account. . . . The plaintiffs are entitled to compensation for the pecuniary loss involved in a reduced income, and a restricted provision for the supply of what they have been accustomed to, and could reasonably have anticipated that the deceased man would continue to supply. Our law lays down no hard and fast rule for such a calculation. It leaves a large discretion to the judge to award what under the circumstances he considers right. . . . If there is any difference between what the children will now enjoy, and what they might fairly have expected to enjoy if their father had lived, that difference must be the main factor in the calculation [of the amount of damages]." It is very difficult to arrive at any accurate estimate of such difference, because many contingencies have to be taken into account. " Not only is there the deceased's expectation of life to be considered, but the question of how much his income would have been in the future ; how long he would have been able to work at his full power ; how much he would have spent on his children, and the contingency of his re-marriage [1]—all these, and other matters, have to be taken into consideration." [2] Similarly where a widow sued for damages for the death of her husband it was held that amongst the contingencies which had to be considered in fixing the amount of damages were the state of health of the deceased and the plaintiff, the probability of the deceased continuing to earn the same wages in the future and the plaintiff's chances of re-marriage.[3] In *Hulley* v. *Cox* [4] the question was raised whether the existence of life policies which became payable to the dependents by reason of the death should affect the amount of damages. It was held that a deduction should be made on that account in any calculation of damages, but no rule for estimating such deduction was laid down. It was said that the amount thereof should be determined on an equitable basis on a consideration of all the circumstances. The question has therefore received only a very vague answer.

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[1] At p. 667.

[2] The principle that mental anguish will not be considered in estimating damages is applicable only in cases where the death was caused through negligence. If the death was caused intentionally, it seems clear that such anguish will be taken into account in assessing damages; see *Edwards* v. *Hyde*, 1903, T.S. 381, and Warneke's case.

[3] At pp. 602 and 603.

[4] The words "conveniences" and "comfort" must be taken to be qualified by the adjective "material," since mental anguish is not an element of damages.

Amounts Actually Awarded.—Since the whole question of damages in an action of the type under discussion is left largely to the discretion and good sense of the trial judge it may be of interest to set out the amounts actually awarded in some of the reported cases. In *Kennedy* v. *Port Elizabeth Harbour Board* [5] the widow of the deceased, who was an overseer in the employ of the Municipality at a salary of £14 per month and who was fifty-three years of age, was awarded £400. In *Waring and Gillow Limited* v. *Sherborne*, the widow of the deceased, who was earning £6 per week and was thirty-one years of age, was awarded £1,600. In *Jameson's Minors* case £4,500 was awarded to the three children, aged sixteen, fourteen and twelve years respectively, the deceased's income having been £2,300 per year and his expenditure on his children £900 per year. In *Hulley* v. *Cox*, £3,500 was awarded to the widow and £1,500 to the minor daughter of the deceased whose income was £770 per year.

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[1] Because re-marriage would probably reduce the amount spent on the children.

[2] Per Innes J. A., in *Jameson's Minors* case, at p. 603.

[3] See *Waring and Gillow Limited* v. *Sherborne*, 1904, T.S. 340.

[4] 1923, A.D. 234.

[5] (1886) 5 E.D.C. 311.

LIABILITY IN DAMAGES UNDER FRENCH ADMINISTRATIVE LAW. II.

[*Contributed by* PROFESSOR LOUIS TROTABAS, *Nancy* [1]].

The Liability of the Administration.—We saw in the previous article [2] that the liability of the administration in the broad sense of the term first makes its appearance in the form of a remedy at the instance of an individual injured by an administrative act against the actual author of the act. Both practically and historically administrative liability appears first in the form of the personal liability of officials. But this liability all the same is not enough to satisfy the idea of justice which demands the reparation of losses caused by the administration. Both as regards the conditions of its application and as regards its practical results this remedy is too restricted. It is necessary, therefore, in addition to this personal liability of the agent, to organize an administrative liability properly so-called which will fall directly upon the patrimony of the State.

This new aspect of administrative liability, which becomes henceforward the general rule, owes its origin to the decisions of the *Conseil d'Etat,* which had no general text of law to found upon. There is no statutory formula fixing the limits of this administrative liability analogous to the articles of the Civil Code (1382 *seq.*) which deal with liability in damages according to the civil law.

The general theory of administrative liability under French law can be constructed only by the study of the decisions, and it is to these that we must turn our attention in the first place. But, although there is no statute creating any general liability of the administration, there is a considerable number of laws which provide that the State shall be liable in certain special cases which are clearly indicated. Accordingly, in studying the liability of the administration under French law, it is necessary to draw a distinction. On the one hand, we have what we may call the common law of this liability, which is the creation of the courts, and, on the other hand, we have certain special fields, in which this liability has been created by particular enactments.

The Elaboration of the General Theory.—Before proceeding to elaborate a general theory of liability, the French administrative courts had to begin by laying claim to exclusive jurisdiction as to this matter, and by annexing it as a thing which belonged to them. The first effort at legal construction which we meet with in this field is the claim by the administrative courts to decide all cases involving the liability of the State. If such actions had been brought before the ordinary tribunals—and this appeared to be the natural proceeding, seeing that they sought for reparation of losses sustained by private persons—the rules as to the liability of the State would have had to be developed within the strict limits fixed by the Civil Code as to civil liability in damages. It would have been impossible within these limits to satisfy the requirements of justice. We can form an idea of what the French law would have become by considering the meagre results achieved in Belgium, where, in the absence of any administrative jurisdiction, this branch of law has remained in the hands of the ordinary courts and is governed by the rules of ordinary private law.[1]

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[1] Translated by the Editor.

[2] Third Series, vol. xii, pt. 1, p. 44.

In fact, our whole theory of liability in administrative law as it exists to-day can be traced back to the famous decision in the *Blanco* case, in which the *Tribunal des Conflits* in the year 1873 laid down definitely that actions in damages brought against the administration fall within the exclusive jurisdiction of the administrative courts.[2] These courts from that time onwards were able to build up the rules of administrative liability according to their own principles and in their special atmosphere. They did so in the first place by taking as the general principle of this liability the idea of " fault," which was, so to say, a part of the succession which had fallen to them naturally from the civil courts from which they had wrested this subject. Later on, however, when it turned out that this idea of fault was an insufficient basis on which to rest the liability of the State, they were able to turn to other formulas, and to substitute for this traditional foundation, at any rate in certain cases, a new principle of liability more supple and more liberal, which may be expressed summarily as the idea of " risk."

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[1] A detailed analysis of the results reached in Belgian cases may be found in the interesting opening addresses delivered before the Court of Appeal of Liège by M. A. Meyers, entitled *De la Responsabilité civile de l'Etat et des Administrations Publiques du fait de leurs fonctionnaires et agents*, 1923 ; *La Compétence des tribunaux et l'Administration*, 1921 ; *La Responsabilité civile des fonctionnaires*, 1922. See also L. Wodon, *Le Contrôle Juridictionnel de l'Administration et la Responsabilité des services publics*, Bruxelles, 1921. The comparison between the practical results reached by the Belgian courts and those obtained by the French administrative courts in analogous cases is excessively interesting, as showing what the theory of administrative liability in French law owes to the existence and the competence of special administrative courts. See also upon this point, G. Renard, *La Théorie de l'Institution*, vol. i, Paris (Sirey), 1930, p. 182.

[2] *Conflits*, 8 fév. 1873, Blanco, *Dall. Pér.* 1873, 3. 17. The question was as to the liability of a public service for an accident caused by a truck used in a tobacco factory. Subsequently the same principle sustaining the competence of the administrative courts was extended to cases of liability for damage caused in the execution of departmental services (*Conseil d'Etat*, 6 fév., 1903, Terrier, *Dall. Pér.* 1904, 3. 65, with the *conclusions* of M. Romieu ; *Conflits*, 29 fév., 1908, Feutry, *Dall. Pér.* 1908, 3. 49, with the *conclusions* of M. Tessier) and as to services administered by the *communes* (*Conflits*, 11 avril, 1908, 11 nov., 1908, *Dall. Pér.* 1908, 3. 67).

Having established the principle then that the applications of administrative liability are matters for the administrative courts, we must now, in order to develop the subject, place ourselves successively at the point of view of these two different stages of evolution in the decisions of the administrative courts. We must, in the first place, by applying the principle of fault, seek to determine the conditions of subjective liability, and then afterwards, when objective liability appears upon the scene, we must apply the principle of risk. And to conclude our inquiry we must ask the question whether liability upon one ground or another is always incurred by the administration, or whether, on the contrary, there are not restrictions in regard to certain acts of public authorities which exclude this liability, and in some cases paralyse the rights of action against the State by victims who have suffered by its acts.

Subjective Liability—Administrative Fault.—The general theory of administrative liability in the French law has its starting-point, then, in the subjective idea of fault. It is to be observed that this point of departure is to a certain extent an unexpected one. By the very fact that it is *subjective* fault implies the play of the factors of consciousness, will and free choice : it would seem that it should be confined to physical persons. The liability of the administration displays itself in practice as being only liability incurred by a fund or sum of money, and is it possible to regard such a fund as guilty of fault ? We shall, however, not undertake to justify the idea of fault as the basis of administrative liability by having recourse to an analysis of moral personality, an inquiry which would carry us too far from our study of the cases. The contradiction between the idea of the liability of a fund and the idea of fault disappears moreover when we take into account that fault on the part of the administration is perfectly reconcilable with the idea of administrative "institution," which fixes the conditions under which administrative power is exercised.[1] Administrative fault—*faute de service*—is a short way of saying that, when an act causing damage has been done by an agent of the public authority in the execution of his service, and without any intention foreign to the service (which would bring in, as we have seen, the element of personal fault on his part), this act is in effect *caused* by the administration : it is its fault, and the administration ought to be liable for it.

In order to fix the limits of application of administrative fault we must place ourselves at different points of view. There is first the point of view of damage. This is the most general, for it leads us to inquire, before examining the idea of fault itself, the field of its application. The point of view of fault properly so called comes next. This is the most important, because it enables us to qualify the damage-causing act, and to fix it as one which generates liability. In the next place comes the point of view of reparation, which is still more practical. It considers the victim, and allows us to determine under what conditions the wrong which has been caused to him is to be made good. Lastly, there is the point of view of the person liable. This enables us to lay the burden of reparation upon the estate—*patrimoine*—which is really liable, and thus to localize the obligation of making good the damage and to fix it upon one out of a number of administrative funds.

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[1] The theory of "institution," which cannot be explained here, is a theory which recognizes certain groups or collectivities as being subject to rights in the same way as physical persons upon grounds which differ from the classical theory of moral personality. See G. Renard, *La Théorie de l'Institution*, vol. i., Paris (Sirey), 1930.

Field of Application of Administrative Fault—Faute de Service.—The notion of administrative fault first emerged in French administrative law as being susceptible of application only in those cases where the damage-causing act was one of those which down to the end of the last century were still designated as *actes de gestion*. This term denoted acts performed by agents of the government in the administration of public property and in carrying on the services of the State by methods and under conditions analogous to those by which private persons manage their own affairs.[1] The field of application of administrative liability for *faute de service* was accordingly limited to those cases in which the administration conducted itself like a private person. Non-liability was the rule, in default of any particular text of the law, in all those cases where the administration acted by means of an *acte d'autorité* or in the exercise of public power—*puissance publique*. Now it is precisely in these latter cases, that is to say, when public officials act by means of issuing orders, and as being entrusted with the authority of the State, that it is particularly important to protect the public against the acts of officials. It was the repudiation, by the writers and by the courts, of this distinction between *actes d'autorité* and *actes de gestion*, combined with the rule as to jurisdiction laid down in the *Blanco* case, which really allowed administrative liability to make its appearance. It was this, in fact, which made possible the continued widening of the field of this liability which, even down to the second half of the last century, was restricted to simple acts of management of public property, whereas it has now come to embrace almost all acts of administration and of the exercise of public authority. This tendency to enlarge the field of liability was clearly manifested in a series of decisions by the *Conseil d'Etat* beginning in 1881, dealing with the administration of waterways. These decisions recognized the principle that the State was liable for accidents to vessels in maritime ports or on canals or rivers caused by harbour officials, defective buoying or inadequate management in the regulation of water.[2] The way was thenceforward open to admit the principle of State liability for the inadequate performance of any public service whatever. This marks a considerable step in advance of the earlier decisions. Formerly liability was restricted to the cases where the administrative act complained of was analogous to an act done by a private person in managing his property—*fait de gestion.* Henceforth we no longer have to consider the *nature* of the administrative act, a necessity which formerly restricted the field of liability. What we have to look at is whether there was an inadequate performance of the public service, whatever the nature of the act complained of may be, and this is a much more liberal way of regarding the matter.

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[1] See *Vocabulaire Juridique*, Paris (*Presses Universitaires de France*), 1930 *vo.*, *Acte d'Autorité*. (*Cf.* Berthélemy, *Droit administratif*, 11th ed., pp. 46 and 52. Note by translator.)

[2] See especially *Conseil d'Etat*, 6 mai, 1881; *Tysack*, 21 juillet, 1882; *Turnbull*, 6 janvier, 1899; *Hoegestrand*, 13 janvier, 1899; *Soc. des Prod. céramiques de Boulogne*, cited by Hauriou, *Précis de Droit administratif*, 11th ed., Paris (Sirey), 1927, p. 324, note.

After these earlier decisions the courts proceeded to widen more and more the field of administrative liability. We must mention as particularly important the case of *Tomaso Greco.*[1] In this case the *Conseil d'Etat* admitted the possibility of liability on the part of the administration for fault of the police service. The victim had been wounded by a shot fired at a mad bull, which had escaped on the public road. The sole reason why the action failed was that the *Conseil d'Etat* found that it was not proved that the shot was fired by a police officer, or that the accident must be attributed to a fault of the public service. It follows clearly from this decision that where fault is proved this is enough to entail liability, and this is confirmed by a judgment of the same period in the case of *Auxerre.*[2] There the *Conseil d'Etat* found there was fault on the part of the public service of a nature to entail the liability of the State. In the course of military manœuvres a young soldier had been killed by the discharge of a gun, which was loaded instead of containing only a blank cartridge. In spite of the fact that the public service here concerned was that of national defence, which belonged in the strictest sense to the field of public authority (*puissance publique*), fault was found proved, and the State was held liable. More recently, the *Conseil d'Etat* has continually reaffirmed, and if possible extended this liability, as we may see, for example, in the case of *Martin,* where the State was held liable for improperly keeping a soldier under arms.[3] Or in the case of 18 juillet, 1919, which admitted this liability, where a young soldier who had been enrolled before the age at which he was legally liable to service was killed soon after his arrival at the front.[4]

The field of administrative liability on the ground of fault in the service is thus manifestly very wide. At the same time, there are limits to it, and we shall see later that there are still certain cases in which the public authority is not liable. But before entering upon the study of the conditions of this subjective liability, it was necessary to make clear that the liability of the administration is not restricted to a liability for damages caused by certain determinate forms of activity. On the contrary, this liability extends to every kind of public action, even in the domain of police power or in the exercise of governmental authority—*puissance publique.*

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[1] 10 février, 1905, *Dall. Pér.* 1906, 3. 81.

[2] *Conseil d'Etat,* 17 février, 1905, *Dall. Pér.* 1906, 3. 81, and see the note by M. Hauriou, under this decision in Hauriou, *Notes d'Arrêts,* 3 vols, Paris (Sirey), 1929, vol. i, p. 529.

[3] *Conseil d'Etat,* 4 avril, 1914, in *Recueil des Arrêts du Conseil d'Etat* (Lebon).

[4] *Conseil d'Etat,* 18 juillet, 1919, *Dall. Pér.* 1920, 3. 2.

Constituent Elements of Administrative Fault—Faute de Service.—We can easily obtain a rough idea of administrative fault by contrasting it with personal fault, which has been defined as the basis of the personal liability of the official. It may in fact be said that, according to French administrative law, there is liability for every fault in the public service, and that the sanction will be incurred by the official or by the service respectively according to whether the fault was that of the official or that of the administration. In other words, personal fault and administrative fault are complementary terms. They are explained and limited the one by the other. But, in reality, this definition of administrative fault which we get by contrasting it with personal fault is not sufficient. It may enable us to divide roughly the liability of the agent from that of the administration, but it does not allow us to form a satisfactory notion of fault, or to trace the limitations of administrative liability.

Now, from this point of view we must not forget that upon this matter we are without any guide either in the form of a text of the law or of a judicial decision, for the *Blanco* case, which was the starting-point of all the administrative jurisprudence in the matter of liability for fault, has, so far as concerns the criterion of fault, only a negative bearing. In fact, far from stating the constituent elements for this liability and determining the characteristics of administrative fault, the *Tribunal des Conflits* in 1873 confined itself to telling us what administrative fault was *not,* and since then it has invariably taken up the same position. " The liability which the State may incur on account of damage caused to individuals by acts done by persons employed in the public service cannot be governed by the principles laid down in the Civil Code as to the relations between private persons. . . . The liability of the State is neither so general nor so absolute. It has its special rules, which vary according to the needs of the service and the necessity for reconciling the rights of the State with private rights." It is undoubtedly interesting to know in this way that the theory of *faute de service* is not to be constructed by the help of the Civil Code, but this makes it necessary for us to examine in what way this theory has been built up by the decisions of the *Conseil d'Etat.* Following more or less the broad principles of private law, but altering these when necessary out of respect for the necessities and the independence of administrative law, the *Conseil d'Etat* insists on the concurrence of two elements before it will admit administrative liability. There must be, in the first place, the element of fault, which is implicit in the idea of *faute de service,* and there must be, in the second place, the element of injury sustained which is contained in the idea of reparation of damages.

I. The idea of administrative fault is not formulated in a uniform manner in the administrative jurisprudence. In its broad lines it may be described in general terms as a bad administrative practice—*une mauvaise habitude de l'administration.* It is thereby contrasted with personal fault, which reveals, instead of an error imputable to the administration, the act of an individual man "with his passions and his weaknesses." But it belongs to the judges of the administrative court to say in each particular case whether a determinate fact is or is not *faute de service.* It is for the court, for example, to discover the tortious character of the act, whether this consists in the faulty working of the service or in the fact that it failed to work or worked too late. It is the business of the court to bring the fault to light by a careful investigation, which takes into account the particular circumstances and the nature of the public service concerned, and we shall see that sometimes the *Conseil d'Etat* will not hold administration liable, unless the fault is one of considerable gravity, whereas in other circumstances a slighter degree of fault will be sufficient. It has not yet been possible to reduce the results of the cases as to the appreciation of fault to a rigid and definite formula.[1]

The statement of certain recent cases will enable us to show in a concrete manner how in fact the idea of *faute de service* is arrived at. To begin with, we have the idea of the neglect of, or the violation of, a law or even of a regulation. The mere fact that there has been a breach of legality entails fault on the part of the service and liability for damages to individuals.[2]

But, in practice, in the application of this formula, very fine distinctions have to be drawn, for the violation of a rule fixed by law ought not in every case and automatically to involve administrative liability. Among the sum of the rules which make up "legality" a sort of hierarchy has been established. There is, in the first place, a higher legality of such a quality that the violation of it is in itself a fault. Below this there is a legality of the second zone, so to speak, which ought no doubt to be respected, but the neglect of which does not appear to be so serious as to entail the liability of the administration or the nullity of the act complained of. Thus, the *Conseil d'Etat* seems to consider *res judicata* as belonging to the superior kind of legality. Where there has been a violation by the administration of this principle there will always be a *faute de service.*[1]

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[1] See P. Duez, *La Responsabilité de la Puissance Publique* (*en dehors du contrat*), Paris (Dalloz), 1927, pp. 22 *seq.*

[2] See, in a case as to *comptoirs d'achat,* the decision of the *Conseil d'Etat,* of 7 janvier, 1927, *Dall. Pér.* 1927, 3. 51, and the note signed P. L. J., which connects the *faute de service* with a breach of regulations. *Comptoirs d'achat* are private firms or companies brought in to assist the public service in the reconstruction of the devastated areas by conducting on behalf of the State operations for the purchase, preservation and transfer of goods or plant. Their existence is interesting as an example of the collaboration between a private enterprise and the public service, and this collaboration involves the application of the special rules of administrative law, notably as regards liability for damages.

And, on the other hand, at the other extremity of the hierarchy of legality the violation of a mere regulation as to form does not in itself constitute an administrative fault. Just as in the remedy for *excès de pouvoir* the *Conseil d'Etat* does not admit that the violation of a prescribed form renders an administrative act illegal in every case,[2] so in questions of liability in damages it lays down that " the omission of formalities does not of necessity involve the administration in pecuniary liability."[3]

It is for the court, in the exercise of its discretion, to decide whether, in the particular circumstances, the breach of law is important enough to constitute a *faute de service.*

Side by side with this idea of violation of a law, administrative fault appears in a manner perhaps even more general in all cases where there has been negligence, mistake, omission or delay in the work of the service. The fault is here material. It results from the fact itself whether it be an act or an omission ; it is no longer a juridical fault resulting from the violation of a rule laid down by the law. It is none the less certain, and the cases, of which some examples have already been given, are numerous in which an act which has been done or the manner in which the service has been conducted discloses an administrative fault.

But, just as it is not every violation of a law which amounts to administrative fault, so here also it is not every negligence, mistake, omission or delay which involves automatically the liability of the public authority. Here also, having once laid down the principle of liability, the courts, without destroying the principle, arrive at modifications and distinctions by taking account of the circumstances of time and place, the nature of the public service concerned and the conditions under which it is carried on. It is in this way, for example, that delay in the execution of the service, when it takes the form of keeping a soldier under the colours illegally, is considered as a fault entailing the liability of the administration.[4] In like manner, in regard to accidents on the public roads, particularly such accidents as are caused by defective lighting, the *Conseil d'Etat* determines whether the characteristic elements of fault are present by considerations of the seasons of the year, the hour and the place.[1] Likewise also, in an hypothesis, which we shall meet with again later when we come to study the possible cumulation of liabilities on the part of the administration and on the part of the official respectively, the *Conseil d'Etat* may find, in the gravity itself of the personal fault of the agent, an element of fault to be imputed to the service which employs him. Lastly, to bring out more clearly the eclecticism of the administrative jurisprudence in determining this liability, it is interesting to notice that the *Conseil d'Etat* goes so far in some cases, in order to establish the liability of the administration, as to admit the idea of the abusive use of its rights by public authority.[2] To sum up, this idea of the fault which involves administrative liability cannot be precisely defined, it is left to the judge to appreciate in the particular circumstances of each case. It is not every violation of law which is a fault in this sense, nor every mistake or inadequacy in the administration of the public service. It must possess a certain gravity before the court will allow it to be considered as fault entailing liability of the administration. In almost all the judgments rendered by the *Conseil d'Etat* they take occasion to say that their practice is not to condemn the administration unless there is fault *d'une gravité exceptionnelle de nature à engager la responsabilité de l'Etat.* As to the appreciation of the degree of gravity which the fault must present in order to make the administration liable, we must admit this depends upon the circumstances of each case, and that there is no exact measure which we can apply to it, for it is in vain to try to appreciate the gravity of the fault by the nature of the activity which provoked it. M. Jean Appleton has attempted to draw certain distinctions.[3] According to him, when the act is one of a quasi-sovereign character the fault must be manifest and must be of a particularly serious nature.[4] When the act is an act done in the exercise of police powers, any serious fault or grave imprudence is enough.[5] And lastly, in those activities which correspond to what were formerly called *actes de gestion*, any fault of whatever degree of seriousness is enough to entail liability. But these distinctions are in reality arbitrary, for very often the *Conseil d'Etat*, which is more concerned with equity, than with framing a logical system, finds that the public authority is liable, on the simple ground of a fault which, even though it may be in a police matter, the court does not qualify as being gross or grave.[1] It is better to admit frankly that the court exercises a wide discretion, and that it is this alone which enables it to reconcile the rights of the State with the rights of individuals, to employ the phraseology of the *Tribunal des Conflits* in the famous *Blanco* case.[2]

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[1] See especially *Conseil d'Etat*, 12 juin, 1914, *Abbé Hardel* in *Recueil des Arrêts du Conseil d'Etat* (Lebon), p. 700, and 8 août, 1919, *Abbé Toesca, ibid.*, p. 740. The claims in these cases were for *excès de pouvoir*, but the law laid down is nevertheless applicable to cases of administrative liability in damages.

[2] See as to the distinction between substantial and accessory formalities and between irregularities which involve nullity and those which do not produce this effect, R. Alibert, *Le Contrôle Juridictionnel de l'Administration*, Paris (Payot), 1926, esp. p. 230. Add a quite recent decision, *Conseil d'Etat*, 17 janvier, 1930, *Dall. Hebdomadaire*, 1930, p. 138.

[3] *Conseil d'Etat*, 4 nov., 1921, Monpillié in *Recueil des Arrêts du Conseil d'Etat* (Lebon), p. 903. *Cf.* in the same sense 17 juin, 1921, Duplan, *ibid.*, p. 594.

[4] *Conseil d'Etat*, 25 juin, 1924, *Dall. Pér.* 1925, 3. 60.

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[1] *Conseil d'Etat*, 31 janvier, 1917, Champagne, in *Recueil d'Arrêts du Conseil d'Etat* (Lebon), p. 106 : 15 fevrier, 1929, *Dall. Hebdomadaire*, 1929, p. 192.

[2] *Ibid.*, 22 nov., 1929, *Dall. Hebdomadaire*, 1930, p. 55. (It will be remembered that in the French *civil* law a right may be exercised abusively so as to entail liability in damages. See, especially, Josserand, L., *De l'Esprit des Droits et de leur Relativité* (Dalloz, Paris, 1927), and the jurisprudence collected in Dalloz, *Nouveau Code Civil Annoté*, *Additions*, 1921, *Appendice à l'article*, 1382. Note by translator.)

[3] *Traité Elémentaire du Contentieux Administratif* (Paris, Dalloz), 1927, No. 238.

[4] *Hypothèse de l'espèce*, *Conseil d'Etat*, 4 janvier, 1918, *Sinai et Duchesne*, *Dall. Pér.* 1920, 3. 1.

[5] See *Conseil d'Etat*, 20 juin, 1919, *Vallet*, and 1er août, 1919, *Renaudie*, cases 8 and 11 in *Dall. Pér.* 1920, 3. 1.

II. Together with the notion of fault the civil law in France recognizes by tradition as one element of liability the existence of damage suffered. One might even say without exaggeration that both in the terms of the articles of the Code and in the interpretation of them by the commentators the damage suffered constitutes in reality the first element of the civil law theory of liability.[3]

The element of fault comes in only in the second place in order to allow the liability to be held at the door of a particular person. Administrative law, which has taken over the spirit if not the letter of the civil law theory of liability, has made the idea of damage sustained the foundation of administrative liability.[4] It is, accordingly, a principle which is self-evident that administrative liability emerges, and the problem of fault presents itself only when there is to begin with a loss to be made good. All the same, in spite of this general rule, it would seem that the decisions of the *Conseil d'Etat* in administrative cases give to this idea of damage suffered a less important place than it occupies in the civil law. There are not a few cases in which the question of liability seems to have been settled without reference to the question of the existence of damage and of its reparation, these matters being, so to speak, relegated to a subsidiary and secondary place. We find, in fact, a certain number of cases where the administration has been found liable not to make reparation for material damages suffered by the citizen, but to compensate him for a mere invasion of his legal rights. These cases are very curious, because they sometimes base administrative liability for fault upon the idea of legality or morality which is an objective idea, and not upon the subjective idea of damages caused to the estate of the plaintiff. These cases, accordingly, are important when we come to consider administrative legality and morality, a matter which will come up again now that we approach the problem of administrative liability in its third aspect, that is, from the point of view of reparation of damage.

The Reparation of the Injury and the Amount of the Damages.—The problem of the reparation of the injury caused, which is the practical end aimed at in every action of damages, presents itself in two very different manners in the private law and in the public law. When we are dealing with the relations of one private person to another and with suits before the ordinary courts, reparation ought to amount to a restitution of the *status in quo ante.* The cause of the damage is to disappear, and its author may be condemned by the judge to make material reparation for the loss caused. It is quite accidental that when restoration of the *status in quo ante* is impossible the judgment takes the form of ordering payment of damages by the application of the idea that damages form the pecuniary equivalent of the loss sustained. But when we are dealing with the relations between a private person and the public authority, and the suit is one before the administrative courts, *restitutio in integrum* is excluded. It is a consequence of the fundamental principles of the separation between administrative and judicial authorities, a principle which displays itself as regards administrative jurisdiction in the formula of the separation between the authorities which belong to the active administration and the authorities which are judicial, that the administrative judge is not entitled to address injunctions to the active administration. He cannot say to him, " Repair the injury done, pull down the building which injures such and such a person, or execute the work which is necessary to re-establish the former situation of a certain piece of private property." Such injunctions would be encroaching upon the prerogatives of the administration which ought to be free to come to its own conclusions. The result is, that the only reparation possible for the injury caused by an administrative fault is pecuniary reparation obtained by a judgment fixing the payment of damages. And, further, it is necessary in addition that this indemnity should not have a tendency to compel the administration to perform a particular piece of work, and for this reason the *Conseil d'Etat*, which cannot order, for example, the demolition of buildings which cause injury,[1] cannot any more bring about this demolition in an indirect way by condemning the administration to an *astreinte*.[2] At the most it can compel the administration to make a choice by offering it the alternative either of pulling down the buildings or of paying damages, but even in this case it is the administration alone which can exercise the choice.[3] The fact that, as a general rule, the reparation of the injury is in this way reduced to the fixing of an amount of pecuniary compensation leads to the delicate problem of putting a value in money on the injury sustained. When there has been pecuniary loss suffered, the solution of the problem is simple : it is a question for the expert valuer, and French administrative practice avails itself normally of expert assistance of this kind which,

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[1] See, for example, *Conseil d'Etat*, 13 mars, 1925, *Dall. Pér.* 1926, 3. 16.

[2] *Conflits*, 8 février, 1873, *Dall. Pér.* 1873, 3. 17.

[3] See, especially, *Colin et Capitant, Cours Elémentaire de Droit Civil Français*, 5th ed., 1929, vol. ii, p. 372.

[4] See, especially, *Conseil d'Etat*, 9 janvier, 1925, *Dall. Pér.* 1925, 3. 65, and *Conseil d'Etat*, 5 nov., 1926, *Dall. Pér.* 1927, 3. 51.

[1] *Conseil d'Etat*, 29 juillet, 1916, *Soubiran*, *Recueil d'Arrêts* (Lebon).

[2] *Ibid.*, 23 mai, 1919, *Gaz de Pézenas* (*ibid.*). (An *astreinte* is a judgment ordering the defendant to pay so much a day until he performs an obligation. See *e.g.*, *Req.*, 1 déc., 1897, *Dall. Pér.* 98, 1. 289. Note by translator.)

[3] See the note by M. Hauriou under *Conseil d'Etat*, 23 nov. 1906, in his *Notes d'Arrêts*, vol. ii, p. 62.

under the control of the judge, guarantees a just estimate of the damages to be paid. But administrative fault may cause something other than material injury: it may sometimes cause "moral damage," particularly when the complaint is not that the plaintiff has sustained pecuniary loss, but that there has been a violation of a legal right which he enjoyed. How are the experts and the judge to put a figure upon this loss? In civil actions it is admitted without question that moral damage calls for full reparation, just as much as material damage, as where, for example, damages are awarded for the suffering caused to the plaintiff by the death of a relative through the fault of the defendant.[1] Now, in the administrative jurisprudence concerning *faute de service*, we find a large number of decisions in which the *Conseil d'Etat*, while finding *faute de service* proved, and also that it was of a nature to involve the liability of the State, nevertheless declines to make the State pay damages for this fault when the victim has not suffered any pecuniary loss. Thus, the *Conseil d'Etat*, having to appreciate the damages suffered by the relatives of a soldier, whose death had been caused by a *faute de service*, found it sufficient to take account only of "the material damages sustained by them, seeing that these alone are capable of being estimated in money."[2] And, likewise, in a case where the *Conseil d'Etat* found that a soldier had been wrongfully detained for two months in a fortress, they considered it sufficient to condemn the State in the costs without awarding any indemnity to the victim.[3] And, again, to give a third illustration, after finding that a taxpayer had been wrongfully sued by the administration of finance, and was the victim of " a fault of exceptional gravity and such as to render the State liable," the *Conseil d'Etat* nevertheless held that seeing that the taxpayer had sustained no material damage he was entitled to no reparation other than the payment of his costs.[4]

It is clear, therefore, that in regard to moral damages a less liberal view is taken in cases in the administrative courts against public authorities than in cases in the ordinary courts against private persons. The explanation of this difference is to be found in the principle that the right of the citizen to be treated by the administration according to law and equity does not give him a subjective right to claim pecuniary reparation for moral damage. The moral damage is repaired " morally " by the formal declaration on the part of the *Conseil d'Etat* that there has been an administrative fault. To award money damages in such a case would not, as in private law, restore the balance between the estate of the wrongdoer and the estate of the victim: it would lay upon the public funds, that is to say, the funds of the taxpayers in general, who are not to blame for the fault and take no benefit by it, the burden of paying a sum arbitrarily fixed as equivalent to the moral damages sustained.[1]

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[1] See *Cass. Civ.* 13 février, 1923, *Dall. Pér.* 1923, 1. 52, note by M. Lalou; *Colin et Capitant, Cours Elémentaire*, 5th ed. (1929), p. 373. G. Ripert, *La Règle Morale dans Les Obligations Civiles*, 2nd ed. (1927), No. 181.

[2] *Conseil d'Etat*, 24 mars, 1916, *Quénot, Dall. Pér.* 1922, 3. 22.

[3] *Ibid.*, 25 juin, 1924, Poirey, *Dall. Pér.* 1925, 3. 60.

[4] *Ibid.*, 1er juillet, 1927; *Demoreuil, Dall. Pér.* 1928, 3. 21, and note by the present writer.

Determination of the Estate Liable.—A *faute de service* is the fault of an administration, and the administration must make it good. But this simple formula may, nevertheless, raise in some cases certain difficulties, for the administration is not a single fixed unit. It is broken up into a certain number of public services carried on by the State, the department, the commune, or by some public corporation.[2] Whenever damages have been caused by a *faute de service* it is not the administration as a whole which is condemned: we must discover among these various services which of them ought to make reparation and suffer the punishment for the fault. Quite naturally, it is the special service which is liable to make good the damage caused by its fault. This would hardly need to be stated were it not for the fact that matters are frequently complicated by the interpenetration of two services. It happens frequently, in fact, that the State, in carrying out some service, makes use of the agents or of the collaboration of a local service, and, conversely, in the work of a local service there occurs not infrequently an intervention by agents or services of the central government. In these hypotheses who ought to bear the penalty of the *faute de service*? In these rather special cases the courts have always endeavoured to separate and estimate separately the respective liabilities of the two funds. On the whole they incline to attach liability to the double idea of the power to take decisions on the one hand, and of interest in the performance of the work on the other hand. Of the two services which collaborated, which is the one which possessed the power to decide and not merely the power to execute? It is that one alone which will be liable. And again, of these two services, which of them was directly interested in the result of the operation in the course of which the fault was committed? Here also it is that one alone which will be liable. Two cases selected from the most recent decisions enable us to give precision to this formula and to grasp its practical bearing. In the case of *Clef*,[3] the *Conseil d'Etat* had to determine the liability of the administration on account of acts of violence committed upon a person by troops charged with preserving order on May 1, 1920.

The maintenance of order was the business of the municipal police, but in the particular circumstances order was being maintained by troops, whose aid had been specially requested, belonging to a service of the central government. In its judgment the *Conseil d'Etat* found that there was no liability on the part of the municipal authorities, and that for the violence inflicted on the complainant—which consisted in his having been made to "run the gauntlet"—it was the State which was liable.[1] They give as a reason that at the moment when the violence was committed the troops "were resting, they were not taking part in any operation ordered by the municipal authority, and were under the exclusive control and supervision of their officers." It was here the governmental service which had the right of decision and the charge of discipline. Hence the liability was on it.

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[1] See for a discussion of this matter the writer's note on the case of *Demoreuil* above cited.

[2] See as to *Etablissements Publics*, Berthélémy, *Droit Administratif*, 11th ed., p. 638.

[3] *Conseil d'Etat*, 13 mars, 1925, *Dall. Pér.* 1926, 3. 16.

In another case the question was to determine who was liable for the damage caused by the fault of a fireman of the city of Paris in driving a motor-lorry? Ought the city to be liable, considering the municipal character of the fire-service, or ought this liability to rest on the State, considering the military character of this brigade of *sapeurs pompiers*, which was directly under the Ministry of War as regards its organization, its recruitment and its discipline! The *Conseil d'Etat* held, in the circumstances, that the sole liability was on the city, because the "fire-service for which this regiment was created performs its duties under the direction and according to the instructions of the Prefect of Police," and also because "it is organized in the interest of the city of Paris, which defrays all the necessary expenses."[2] Power of decision and interest in the execution are the two elements, which enable the *Conseil d'Etat* to determine upon which of two public funds this charge should be laid.

Such are the general ideas according to which, in French administrative law, the liability of the administration is determined upon the basis of *fault*. The cases which we have had occasion to notice deserve naturally a much more complete study. But they indicate, broadly considered, that a very liberal view is taken of the liability of the administration. Liberal as this view is, particularly when we have regard to other branches of law in which the non-liability of the State is the rule, nevertheless, this subjective responsibility of the administration is found to be insufficient. It does not in practice afford a complete guarantee to the citizen, or ensure, by the application of the principle of liability for fault, a just apportionment of public burdens which the maladministration of a public service ought never to throw upon a determinate estate or a single individual. The fact that this liability is based on the general idea of *fault* creates in itself a restriction. Fault is not presumed, and it is for the citizen to prove it, which he is not always able to do.[3]

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[1] "Gauntlet" is sanctioned by usage, but apparently it is in this connexion a corruption of gantlope. The French equivalent is *passage à tabac*. The origin of the use of *tabac* in this sense appears to be obscure. Note by translator.

[2] *Conseil d'Etat Cie La Preservatrice*, 9 nov., 1925, *Dall. Hebdomadaire*, 1926, p. 10.

[3] Administrative justice does, however, admit a kind of presumption of fault in certain exceptional circumstances. Thus *e.g.*, in cases of damage caused by motor vehicles, the *Conseil d'Etat*, according to the *Blanco* case, is not concerned to follow the decisions of the *Cour de Cassation*, which hold that there is here a presumption of fault created by art. 1384 of the Civil Code, which makes a person liable for damage caused by a thing under his control, unless he can prove that he was free from

On the other hand, the fault of the wrongdoer may disappear in the presence of the fault of the victim, and a private citizen who has been guilty of negligence may find he has in this way lost his remedy against the administration. And, further, there is no fault when the damages have been caused by *force majeure* or *cas fortuit*, and it may happen in this way that the private individual has to suffer a loss which was, nevertheless, brought about by an administrative act. It is for these reasons that the idea of fault, in spite of all its merits, does not permit a sufficient development of administrative law. The *Conseil d'Etat*, taking a very liberal view of the matter, has found a way of extending the field of liability. When the official mind and the mind of the public had become well accustomed to the principle that the State was liable in damages on the ground of fault, the *Conseil d'Etat* did not hesitate, while preserving the idea of fault as the general principle, to abandon this principle, nevertheless, in special circumstances, when this course appeared to be necessary, and to find the administration liable upon the objective ground of *risk*. This will be explained in the next part of this study.

blame. (See *Dall. Pér.* 1925, 2. 41, and *Dissertation* by M. Savatier. Note by translator.) But, all the same, the *Conseil d'Etat* has itself created a theory basing administrative fault in such cases on a presumption of fault arising from the dangerous character of a motor-car. See *Conseil d'Etat*, 22 décembre, 1924, *Dall. Pér.* 1925, 3. 9, and the note of M. J. Appleton, *Conseil d'Etat*, 17 juin 1927, *Dall. Pér.* 1927, 3. 40.

ARBITRATION IN ENGLAND AND GERMANY. II.

A STUDY IN COMPARATIVE LEGISLATION AND CONFLICT OF LAWS.

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The Award.—The termination of arbitration proceedings is the award, and we have to consider its nature, form and effects, and the ways and grounds by which it may be impeached under the two systems of law under inquiry.

(*a*) *English Law.*—Clause (*h*) of the First Schedule runs: "The award to be made by the arbitrators or umpire shall be final and binding on the parties, and the persons claiming under them respectively." This provision is merely declaratory of the common law.[1]

The award must be in writing, where the arbitration falls within the provisions of the Arbitration Act, unless clause (*c*) of the First Schedule is excluded. In the case of several arbitrators it must, in the absence of a contrary provision in the submission, be executed by all the arbitrators jointly at the same time and place.[2] The award is valid as soon as it is made, and the law itself does not require publishing. But in order to make the time run within which a motion to set aside the award must be made under Order LXIV, r. 14, publication may become necessary. But publication is already effected if the arbitrator, after execution of the award, gives notice to the parties that the award is made and ready to be delivered.[3] It is usual and approved by the court that an arbitrator may keep the award until his fees are paid by the party taking it up.[4] An award does not require technical language as long as it is clear and certain.[5]

"A valid award on a voluntary reference is a final and conclusive judgment, as between the parties, respecting all the matters referred by the submission. It binds the rights of the parties for all time without appeal, both as to fact and law."[6] A party is bound to take notice of an award and to obey it.[7] If an action is brought on a cause which had already been determined by an award, the award is a complete defence by itself, unless an award imposes also a duty, in which case performance of the duty must also be pleaded.[1] A valid award is conclusive evidence as between the parties as to the facts found by it,[2] but not in criminal proceedings.

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[1] Russell, *On Arbitration and Awards*, 11th ed., p. 447.

[2] *Ibid.*, p. 448.

[3] *Ibid.*, p. 452.

[4] *Hicks* v. *Richardson* [1797] 1 B. & P. 93.

[5] *Stonehewer* v. *Farrar* [1845] 6 Q.B. 730.

[6] Russell, *op. cit.*, p. 479.

[7] *Ibid.*, p. 487.

An award may be set aside where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured (s. 11, 2, Arbitration Act). Cases of misconduct under this section may arise, where an arbitrator intentionally disregards the law or attempts to preclude a party from an application for a special case to be stated under s. 19 of the Arbitration Act or does not follow the opinion of the court on a case stated under s. 19 of the Arbitration Act, or has some personal interest in the subject-matter of the arbitration, etc.[3]

An award is improperly procured if an arbitrator is bribed or treated or misled by either party by fraudulent concealment of matters where a party was under a duty to disclose. Besides this statutory jurisdiction the court had and has an inherent jurisdiction to set aside awards, if upon the face of the award it can be clearly shown that the arbitrator decided wrongly[4] as to fact or law, unless the error is immaterial for the decision. "Upon the face of the award" includes a document contemporaneously delivered with the award.[5] An award may further be set aside for want of finality[6] as to all subject-matters of the arbitration, or for uncertainty,[7] or if the performance of an award is impossible by its nature or the award inconsistent[8] or in excess of authority. These are not the only grounds for which the court may set aside an award under its inherent jurisdiction, but they are apparently the main ones. If part only of the award is bad and this part is separable, the residue of the award may be good.

By order LXIV, r. 14, the application to set aside an award may be made within six weeks after the award has been published to the parties, *i.e.* notice to the parties that the award is made and complete,[9] but the court may extend the time before or after the same has elapsed. It is not intended to deal here with the technical rules of procedure in a motion to set aside an award. As grounds of opposition to a motion to set aside may be preferred,[10] that the party moving was not injured or the party moving acquiesced in the award by knowingly accepting a benefit under it. On a motion to set aside the court may turn the motion into a special case, or refer the award back for reconsideration.[11] In the King's Bench Division the motion is to a Divisional Court and in Chancery to a judge, and an appeal lies to the Court of Appeal.[12]

(*b*) *German Law.*—Under German law the effects of a valid award are the same as under the declaratory provision in clause (*h*) of the First Schedule to the Arbitration Act. § 1040, *Z.P.O.*, reads: "An award has as between the parties the same effects as a valid judgment of a court, against which no appeal lies."

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[1] Russell, *op. cit.*, p. 492. [2] *Ibid.*, p. 494. [3] *Ibid.*, p. 204 ss.

[4] *Buerger* v. *Barnett* [1919] 89 L.J.K.B. 161.

[5] *Halgate* v. *Killick* [1861] 31 L.J. Ex. 7.

[6] Russell, *op. cit.*, p. 220. [7] *Ibid.*, p. 230. [8] *Ibid.*, p. 235.

[9] *Hemsworth* v. *Brian* [1844] 14 L.J.C.P. 36. [10] Russell, *op. cit.*, p. 256 ss.

[11] *Goddard* v. *Smith* [1865] 13 L.T. 159. [12] Russell, *op. cit.*, p. 263.

This implies by reference to the effects of a valid judgment of a court all the essential requirements and effects of an ordinary judgment as they are established under German law. So it is necessary that the whole differences in dispute are adjudicated upon by the award and not only elements of it [1] nor interlocutory awards; further that an award is only binding as to the matters referred to arbitration.[2] An award is to be construed and interpreted according to the German rules applying to judgments [3] and reference is to be made to the reasons attached to the award (§ 1041, s. 5, *Z.P.O.*), which seems to correspond with the English practice as to "contemporaneous documents." An award like a German judgment does not bar a new action in the identical dispute, but it is a complete defence, if pleaded. The position is the same as under English law. An award under German law binds not only the parties [4] but all persons claiming through or under them and such third persons or strangers to the submission as can be bound by contracts of the parties. A valid award is conclusive evidence as between the parties on the point decided, but not in criminal matters (§ 262, *Strafprosessordnung*). As to the form of the award § 1039, *Z.P.O.* provides that the award is to be dated and signed by all the arbitrators and signed copies thereof are to be served on the parties, and finally the original, together with proof of service, is to be filed with the clerk of the proper court.

Only after fulfilment of all these requirements does the arbitration come to an end and the arbitrators become *functi officio*. Under English law, as we have seen, there is nothing corresponding to this formal termination of the arbitration, and the publishing there necessary to start the running of the time within which a motion to set aside must be made is of less formality. All the arbitrators have to sign the award, whereas it is sufficient that one of them or a third person files it as agent. The requirements of § 1039, *Z.P.O.* cannot be dispensed with by the parties or arbitrators if a formally legal and valid award is wanted.[5] And these provisions apply equally to German and foreign awards. If the submission does not provide to the contrary the absolute majority of the votes of the arbitrators shall be a sufficient majority (§ 1038, *Z.P.O.*).

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[1] Stein, *Die Zivilprocessordnung für das Deutsche Reich*, 13th ed., vol. i, p. 853.

[2] By analogy of § 322, *Z.P.O.* The position under English law is identical, Russell, *op. cit.*, p. 480.

[3] *R.G.*, vol. 93, p. 156.

[4] Stein, *op. cit.*, vol. ii, p. 1054. Identical English law: Russell, *op. cit.*, p. 485.

[5] Mr. Weiss writes in 43 *L.Q.R.*, p. 206: "As an instance [of the rules of procedure adopted by permanent courts of arbitration displacing the rules of the code] may be mentioned the almost universal disregard of the provision in the Code that every award must be lodged with the court of law, as a condition precedent to proceedings for its enforcement being taken. Indeed, the trade associations, etc., even provided their own sanctions for disobedience to the awards of their courts, the strongest, and, with respect, the most illegal of which being the blacklisting of the disobedient party. This was, of course, a glaring instance of injustice in that the disobedient party was subjected to arbitrary force regardless of the provisions of the law of the land and the remedies provided by it. That such a state of affairs

In the case of clerical errors and accidental slips appearing on the face of an award the arbitrators may rectify it under observance of the provisions of § 1039, *Z.P.O.*[1]; in case of an award dealing only with part of the subject-matter referred to arbitration the parties may ask the arbitrators to resume their office and deal with the omitted part of the submission.[2]

Under German law an award may be set aside on the grounds enumerated in § 1041, *Z.P.O.* These are:

(1) If the arbitration proceedings were impeachable. This includes cases [3] where the arbitrators had no authority at all to arbitrate, and cases where they exceeded their authority conferred upon them either by the submission or by the subsidiary provisions of the German law. The former case refers to a submission void *ab initio*, or a submission revoked, or an award deciding disputes not referred, or an arbitrator not properly appointed or properly objected to before the award. The latter case has in view excess of authority by breaking material rules of procedure prescribed by the parties, or an award illegal upon its face or intentional disregard by the arbitrators of those rules of law which are compulsory.[4]

(2) If the performance of the award would be against a rule of law. In case of change by legislation after an award, the law in force at the time of the decision of the court prevails.[5]

(3) If a party was not represented in accordance with the law during the proceedings. This includes cases of an unauthorized agent, and

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could not be termed otherwise than as highly objectionable is obvious, and the courts of law have consequently always viewed awards with suspicion."

I am unable to see how the alleged unlawful procedure of trade associations can be disobedience to the provisions of the Code or " displace them." The position is merely this, that a person who does not comply with rules given for his benefit, or does not cause them to be complied with, cannot avail himself of the benefit which the law otherwise would confer. (See also Nussbaum, *Yearbook*, vol. ii, p. 385.) Mr. Weiss is further incorrect in stating that the blacklisting of a disobedient party by a trade association is " most illegal." It is not illegal in England (see *Ware and De Freville, Ltd.* v. *Motor Trade Association*, 37 T.L.R. 213 [1921] 3 K.B. 40, and *Sorrell* v. *Smith* 41 T.L.R. 529 [1925] A.C. 700). By the former case it is even not illegal as against non-members. It is certainly not against German law, if the rules of a trade association are observed. I further fail to see how the courts, in consequence of awards which never came before their tribunal by their nature, could view awards with suspicion.

[1] Stein, *op. cit.*, vol. ii, p. 1051, N. 10. This corresponds with the position under English law by s. 7*c* of the Arbitration Act.

[2] Under English law an award may be set aside as not final if it does not decide all the issues (*Kilburn* v. *Kilburn* [1845] 13 M. & W. 671).

[3] Stein, *op. cit.*, vol. ii, p. 1057 ss.

[4] For this last reason a party may also oppose the enforcement of an award, (§ 1042, *Z.P.O.*).

[5] *R.G.*, vol. 108, p. 140.

cases where the party had not the legal capacity or right of disposal. But these irregularities may be waived, if possible, by law.

(4) If the right of audience was refused to a party.

(5) If the award has not the reasons annexed.

(6) If a judgment of a court could be upset for the reasons enumerated in § 580 x. 1–6, *Z.P.O.* These reasons are mainly perjury or corrupt practice by a party, witness or judge, or a faked document put in evidence, if the judgment is based upon them and the wrongful acts have been properly proved before a criminal court (§ 581, *Z.P.O.*).

Generally the parties can waive by agreement beforehand their objection to the irregularities under ss. 4 and 5 above. And it would seem that the parties during the arbitration proceedings must object, at the risk of losing their remedy, to irregularities, otherwise the inference may be drawn that a new submission covering the irregularity has been made.[1]

The form of the proceedings to set aside an award is by § 1044, *Z.P.O.* The action must be brought within one month after acquiring knowledge of the irregularity, but this time starts to run at the earliest from the moment an order for the enforcement of an award (see later) becomes unappealable. An action to set aside cannot be brought after ten years from the last-mentioned point of time. If an award is set aside the enforcement of the order is to be revoked at the same time. The intention of the German code seems to be to give a party time for his action to set aside an award until the other side has, by obtaining an enforcement order of the court, clearly indicated his intention to avail himself of the benefit of the award. The above grounds for setting aside an award are also available by way of defence in an action for a declaratory judgment, that an award is valid, or in an action brought on the cause after the plaintiff has pleaded the award as reply to the defence taken by the defendant.[2] After an award is set aside the submission, as a rule, comes to an end,[3] except probably where a party was not properly represented in the proceedings (§ 1041, s. 3, *Z.P.O.*).

If we turn now to a comparison of the "setting aside an award" procedure under both systems of law, the following conclusions may be drawn.

All the reasons for which under German law an action to set aside may be brought are reasons on which an English court may either, under s. 11, rule 2 of the Arbitration Act or under its inherent jurisdiction set aside an award except that default in annexing the reasons to an award under English law does not affect an award unless the parties have provided differently in the submission. On the other hand, the grounds for setting aside under English law are wider as they include intentional disregard of all rules of law and a wrong decision of the arbitrator appearing on the face of the award. The procedure under English law is more elastic and gives room for the discretion of a court to turn the motion into a special case or to refer back, whereas the German court has no such discretion. Finally, there is under English law a ground of defence to a motion to set aside, namely that the party seeking the relief was not injured, which is unknown to German law.

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[1] *R.G.*, vol. 105, p. 385. Under English law this inference cannot be drawn because of the formal requirements of a submission under the Act, but the English court in its discretion may refuse an application on the ground of acquiescence. "What right had he then to lie by, with his grievance dormant in his own bosom, and now dispute, for the first time, the validity of the authority which has been exercised ?" (*Bignall* v. *Gale* [1841] 10 L.J.C.P. 169 ; see Russell, *op. cit.*, pp. 433–36). But under both laws it makes a difference whether the parties appeared themselves or not. German law : *R.G.*, vol. 40, p. 401. For the English law : Russell, *op. cit.*, p. 437.

[2] Stein, *op. cit.*, vol. ii, p. 1055.

[3] *R.G.*, vol. 108, p. 374 ; vol. 69, p. 54.

Enforcement of the Award.—The last chapter of our inquiry, moving on comparative lines, is on the enforcement of awards.

(*a*) *English Law.*—Under English law an award may be enforced in the following ways:

(1) By action as of right, whether the submission was by parol, by writing under hand or by deed. This action is based upon an implied mutual promise in the submission to perform the award of the arbitrator.[1]

The enforcement by action is the appropriate remedy where a submission is by parol or where an award is not final or where the validity of an award is doubtful. The action is not precluded by a prior order under s. 12 of the Arbitration Act or by a prior committal for contempt. The claim is based on the submission and the award. Only such defences are available as are directed against the submission and the validity of the award, therefore error of facts, misconduct or mistake[2] on the part of the arbitrator cannot be pleaded in this action, but the proper course would be in respect of them to move to have the award set aside. But accord and satisfaction and excess of jurisdiction are a good defence.[3]

(2) An award may be enforced by attachment. By s. 1 of the Arbitration Act a submission has the same effect as if it had been made an order of court. Therefore the old procedure of attachment still lies in this case, although it does not extend any more to debts of money (Debtors Act, 1869, s. 4). The submission must be in writing, if an attachment should be sought for. Attachment is the penal process of arrest and imprisonment for contempt of court. A party, in order to succeed on a motion for attachment, must prove that the award had been served upon the other party, and that a demand had been made to obey the award. Such a motion may be opposed by objections as to irregularities in the demand, or service, or defects on face of the award, or revocation of submission, or it may be pleaded that a condition precedent has not been performed, or that the validity of the award is doubtful.

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[1] Russell, *op. cit.*, p. 273.

[2] *Thorburn* v. *Barnes* [1867] L.R. 2 C.P. 384.

[3] Russell, *op. cit.*, pp. 282, 283 ss.

The court, in granting an attachment, may stay it for a certain period or impose such terms as would seem equitable.[1] Attachment is rare since the Arbitration Act.

(3) The courts by their inherent jurisdiction could always give a rule for the payment of the amount awarded, and since the Judgments Act, 1883 (1 & 2 Vict., c. 110, s. 18), such a rule has the effect of a judgment. The power to grant a rule is discretionary. A rule to pay the amount awarded is not of importance or advantage now since

(4) S. 12 of the Arbitration Act provides a better mode. It runs: "An award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect."

The submission, to fall under this section, must be in writing. The application of a party to the court under this section is to ask that judgment may issue on the award. The court has, however, no power to direct judgment to be entered in accordance with an award,[2] because this would be a judgment instead of leave to enforce an award. A party may bring an action on the award notwithstanding that leave to enforce had been obtained.[3] But leave to enforce will not be granted and an action on the award instead is to be preferred where an award is not final, as where it omits to define the liability[4] or where the validity of an award is doubtful.[5] After leave has been obtained, the ordinary rules as to execution of judgments apply (Order 42 of the Rules of the Supreme Court). Writs of execution are issued for the High Court at the Central Office (O. 61, r.l.n.) and the order of the court and the award are to be produced to the officer by whom the writ should be issued (O. 42, r. 10).

(*b*) *German Law.*—Under German law the modes of enforcing an award are fewer; (1) § 1042, *Z.P.O.* runs as follows: "Execution may issue on an award if the award has been declared enforceable by decree of the court."

"The decree is not to be granted if the award intentionally disregards rules of law, which the parties could not validly have dispensed with. The motion for a decree is to be stayed if a party has proved within a period fixed by the court that he has brought an action to set aside the award."

The decision of the court is in the form of a "decree," which implies, in the German legal language, that a hearing is not required, but a pleading in writing is sufficient, and the decree does not need to have the reasons annexed (§ 329, *Z.P.O.*).

There is further no appeal in the technical sense against decrees, but only a *Beschwerde*, or rather *sofortige Beschwerde* as provided for by § 1045, *Z.P.O.*

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[1] Russell, *op. cit.*, p. 304.

[2] *Ibid.*, p. 268.

[3] *China Steam Navigation Co.* v. *Van Laun* [1905] 22 T.L.R. 26.

[4] *In re Willesden Local Board and Wright* [1896] 2 Q.B. 412.

[5] *In re Boks & Co. and Peters, Rushton & Co.*, 120 L.T. 516.

The intention of the code is to simplify the proceedings for obtaining a decree of leave to enforce and not to hear any objections to an award in these proceedings, but to have them referred to a proper action to set aside an award, except where it is alleged and proved that the arbitrators intentionally disregarded some of the few compulsory rules of law, which are given for reasons of German public policy. It is obvious that no court can give its assistance to enforce awards labouring under such intentional disregard on the side of the arbitrators. And this exception must also be extended to cases where the performance of the award would be against a rule of law.[1] Otherwise, an action to set aside an award, and a motion for a decree of leave to enforce, are so much independent, that leave to enforce does not preclude a party afterwards from bringing an action to set aside an award and that leave to enforce has no effect on the validity of an award. The only connecting points are, that a motion to obtain a decree for leave to enforce must be stayed, if a party chooses to bring an action to set aside an award during the proceedings of the motion, which he is on the other hand not bound to do at this stage, and the other connexion is, that the time for the limitation of the action to set aside an award starts to run only after the decree for leave to enforce. Furthermore, as we have seen already, a valid award does not need a decree for leave to enforce in order to have its effects as *res judicata* or as a judgment. But under English law, as we have seen, in the course of a motion for leave to enforce the defendant may plead all the grounds which would render the validity of the award or the right to proceed upon it doubtful, and the English court then usually leaves the parties to proceed by action, and no summary order of leave to enforce will be made.[2] And further, under English law, default in pleading these grounds in the course of a motion may even preclude a party later on from applying to set aside an award on these grounds, as it may constitute an admission.[3] The present position under English law seems to be the same as it was under German law before the amendment by the Statute of February 13, 1924. Under the old § 1042, *Z.P.O.* a party had in the course of a motion for an execution judgment (as it then was) to plead at the risk of preclusion all the then available grounds for setting aside an award.

After a decree of leave to enforce has been obtained the ordinary procedure for execution on judgments applies, and it is necessary that the clerk of the proper court grants an execution clause (§ 724, *Z.P.O.*) which roughly corresponds with the English institution of writs.

If an award is set aside after a decree of leave to enforce, the decree is to be set aside at the same time (§ 1044, *Z.P.O.*).

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[1] *R.G.*, vol. 108, p. 140.

[2] See note 5, p. 234.

[3] But if a party under English law by voluntary act performs an award this does not seem to constitute acquiescence, and a bar from moving subsequently to have it set aside; see *Bartle* v. *Musgrave* [1841] 1 Dowl. N.S. 325. Order 42 r. 31*a* gives the court discretion to grant leave to enforce, although the time for moving to set aside has not elapsed, and on such terms as may be just.

If after an award new material has matured which would otherwise be a ground for setting aside an award, this material cannot be brought in a motion for leave to enforce as defence,[1] nor can the award be set aside, but a separate action has to be taken with the purpose of obtaining a judgment of the court declaring that execution will not lie in future on the award (§ 767, *Z.P.O.*).

This action may be brought either before a decree of leave to enforce has been granted or after such a decree. The judgment of a court in this action preserves formally the award, but in fact, execution cannot be levied after such declaratory judgment,[2] and the new material may be used by way of defence against the pleading of an award. So the enforcement of an award in a wider sense is refused.

Under English law discovery of new material or new evidence would in the absence of fraud or concealment not be a good ground either for setting aside an award, but the court would in its discretion remit the award to the arbitrator for reconsideration.[3] And in the course of a motion for leave to enforce the pleading of new material or evidence would result in the refusal of leave to enforce, and in a subsequent action on the award, in which *e.g.* accord and satisfaction[4] may be pleaded.

In concluding our comparison between the German motion for a decree of leave to enforce (§ 1042, *Z.P.O.*) and the English motion for leave to enforce under s. 12 of the Arbitration Act we may well hold that the English motion is an *Exequatur* on the merits of an award in the negative sense, because the court will, in cases of doubt, leave the parties to their remedy by action on the award, whereas the German motion since the amending Statute of 1924 is in principle an *Exequatur* not on the merits of the award.[5]

(2) The other method of enforcing an award is by action. The action may either be on the award and submission as *causa*, like the English action,[6] or it may be an indirect way of enforcing an award by suing upon the original *causa* and pleading the award by way of reply to defences met by the award.[7] An award so pleaded cannot be defeated by grounds other than would have been available in an action to set aside an award or in the case of new material or facts arising after an award in an action according to § 767, *Z.P.O.*

The action may be brought for two ends. It may either be for the purpose of obtaining a declaratory judgment that an award is valid, and this is possible so far as in general declaratory judgments (§ 256, *Z.P.O.*) may be obtained *i.e.* if there is a legal interest in an early judicial declaration of the rights. And in the particular instance of an award the justification may also be since the Statute of 1924 in the fact that a motion to set aside an award may be brought after a decree of leave to enforce was obtained. The other form of action is one brought for the performance of the award. According to the general principles of the law of German procedure,[1] it is not open for a claimant to frame his claim as he chooses, but he must adopt the shortest and least expensive mode, if there are two or more ways. This is a principle of economy in procedure, and default of complying with it will lead to a dismissal of an action for "want of protectionable interest."[2] Therefore, success is usually refused to an ordinary action to enforce a German award, because there is the shorter and cheaper way of § 1042, *Z.P.O.* by way of motion for leave to enforce. But under exceptional circumstances an action may be brought on an award where this shorter way is not possible, as in cases of foreign awards, which do not comply with the requirements of German law, and where enforcement of German awards is sought for or against successors in title[3] or where an action for a declaratory judgment would otherwise lie and the action for performance would be the shorter way as against a declaratory judgment, and a subsequent motion for a decree of leave to enforce[4] or where an award is only declaratory, and the performance of an obligation arising out of the award is sought.[5]

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[1] Stein, *op. cit.*, vol. ii, p. 1068.

[2] *Ibid.*, p. 528.

[3] *Sprague* v. *Allen* [1899] 15 T.L.R. 150.

[4] *Smith* v. *Trowsdale* [1854] 3 E. & B. 83.

[5] The position is similar under s. 15 of the Indian Arbitration Act, 1899, but different under Order 52, s. 3 (14) of the Supreme Court of the Gold Coast Ordinance, No. 4 of 1876.

[6] Stein, *op. cit.*, vol. ii, p. 1065, Note 26.

[7] See Stein, *op. cit.*, vol. ii, p. 1062. Mr. Weiss in 43 *L.Q.R.*, p. 209, calls such an action, not quite correctly, " proceedings *de novo*." See Nussbaum, *Yearbook*, vol. ii, p. 385. Mr. Weiss mentions only this way by action.

The *Reichsgericht*,[6] in expressing these principles, says: "An action to enforce an award may be allowed just as well in the case of a German award as in the case of a foreign award, but only if there are obstacles in the way of their being enforced by decree of leave to enforce, which obstacles cannot be remedied, as *e.g.* non-compliance with the provisions of § 1039, *Z.P.O.*" (so apparently also *dicta* in the decision *R.G.*, vol. 30, p. 370, which dealt with the enforcement of foreign awards).

In the subsequent reasons for the above decision the *Reichsgericht* introduces also a new aspect of the undesirability of an action to enforce a German valid award, because it says the judgment debtor may then be exposed to execution on two titles: the judgment in the action, and the award declared enforceable.[1]

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[1] See *e.g.* *R.G.*, vol. 88, p. 267; and § 256, *Z.P.O.*

[2] See also Kahn, "English judgments *in Personam* and *in Rem* in Germany," *Journal of Comparative Legislation and International Law*, Third Series, vol. ix, pt. iv, p. 218.

[3] Stein, *op. cit.*, vol. ii, p. 1068.

[4] *Ibid.*, p. 1062.

[5] *Die Rechtsprechung der Oberlandesgerichte*, vol. 29, p. 291. See also Warneyer's *Jahrbuch der Entscheidungen*, 1914, p. 94, No. 70, cited by F. Oppenheimer in Nussbaum, *Yearbook*, vol. i, p. 289 s. These decisions are before the Statutory Amendment of 1924.

[6] Judgment of July 1, 1927, in *Juristische Wochenschrift*, 1927, p. 2464.

Questions of International Law and Conflict of Laws.—The remaining part of the inquiry must now be directed to the questions of international law and conflict of laws under both systems of law.

(*a*) *English Law.*—Under English law a submission to arbitration under foreign law is valid.[2] The Arbitration Act does not mention foreign awards at all, nor does the Common Law define what is a foreign award. It seems that arbitration to be held according to foreign law certainly constitutes a foreign award; it is doubtful, however, whether an arbitration to be held according to English law but in a foreign country would result in an English award. The question is not of great importance, as the arbitration takes place as a rule in England if English law is applicable.

Whether foreign law is to be applied depends upon the intention of the parties to be gathered from the circumstances of the case. Very often the fact that a permanent institution is to function as arbitrator or umpire will indicate whether the arbitration should proceed under foreign or English law, and may have even the further effect of not only making the arbitration clause to be construed and governed by that law,[3] but also the whole contract[4] containing the clause.

The English courts give effect to a submission under foreign arbitration by staying proceedings in an English court, if such should be brought in breach of the contract contained in the submission.[5] This extends to cases of submissions under a foreign court, which is treated for this purpose like an arbitration tribunal.[6] On the other hand, if an action is brought in a foreign country contrary to a submission making the award a condition precedent and to be governed by English law, the court may by injunction restrain a party from pursuing the action.[7] By the Arbitration Clauses (Protocol) Act, 1924 (14 & 15 Geo. V, c. 39), clause 4, it seems that the discretion of the English courts as to granting stay of proceedings is taken away within the limited sphere of the application of the Act.[1] A question of not merely theoretical interest is whether an agreement to refer and the relations arising hereunder are substantive law or deal with the remedy only according to the English conception.

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[1] These considerations are unknown to English law, as an action may be brought on the award after leave to enforce under s. 12 of the Arbitration Act has been obtained (*China Steam Navigation Co.* v. *Van Laun* [1905] 22 T.L.R. 26). This danger is evidently still greater in the case of a foreign judgment; see W. Piggott, *Foreign Judgments*, vol. i, p. 14. He suggests, as an essential condition for an execution judgment, proof that proper attempts to obtain satisfaction in the country of the first judgment have been made, and that such attempts have failed.

[2] *Merrifield, Ziegler & Co.* v. *Liverpool Cotton Association, Ltd.*, L.T.R. 105, p. 97; *Norske Atlas Insurance Co.* v. *London General Insurance Co.*, 43 T.L.R. 541; *Bankers and Shippers Insurance Co. of New York* v. *Liverpool Marine and General Insurance Co., Ltd.* [1924] 19 Lloyds Law List Reports 335 and 24, p. 85; and see Russell, *op. cit.*, p. 273.

[3] *Hamlyn & Co.* v. *Talisker Distillery Co.* [1894] A.C. 202, per Lord Herschell at p. 208: "that particular stipulation," namely the arbitration clause, shall be interpreted according to English law.

[4] *Spurrier* v. *La Cloche* [1902] A.C. 446, per Lord Lindley, p. 450.

[5] *The "Dawlish"* [1910] P. 339.

[6] *Kirchner & Co.* v. *Gruben* [1909] 1. Ch. 413; *The "Cap Blanco"* [1913] P. 130.

[7] *Pena Copper Mines, Ltd.* v. *Rio Tinto Co., Ltd.* [1912] 105. L.T. 846.

The importance of the distinction lies in the fact that the English courts cannot apply foreign law of procedure or law as to remedies, but only their own, whereas foreign substantive law will be applied, if applicable to a contract. In Hamlyn & Co., etc. (see note 3, p. 238) it was argued that an *agreement* to refer dealt with the remedy, and was therefore as to its validity subject to the *lex fori*, but Lord Watson said: "I can find no authority, and none was cited to us, to the effect that, in dealing with the prejudicial question, whether the court has jurisdiction to try the merits of the case, the court ought to disregard an agreement to refer which is *pars contractus*, and binding according to the law of the contract, because it would not be valid if tested by the *lex fori*." In the Norske case (see note 2, p. 238) the court held, by applying Norwegian law to the form of a submission in an action on a Norwegian award, that the form of a submission is part of substantive law, and therefore, although the contract in question would not have been admissible as evidence in an action on a policy of reinsurance as being against the *lex fori* (Stamp Act, 1891, s. 93, and Marine Insurance Act, 1906, ss. 22 and 23), it was held admissible as evidence for the submission. In the Merrifield, Ziegler Co. Case (see note 2, p. 238) the question whether in an action on an award a party was authorized to be plaintiff after an assignment of the benefit of an award, was decided according to the *lex fori* because it was held to be a question of procedure.

It seems that the agreement to refer is in respect of questions relating to its validity, considered substantive law or *lex contractus*, whereas the enforcement of an award deals with the law of remedy, and is, therefore, law of procedure.[2]

As to the rules governing the effects of a submission and the conduct of an arbitration it seems that they belong to the law of procedure. "The law having asserted its jurisdiction over these consensual arrangements for the decision of disputes between parties, and the machinery of the law having been introduced which gives effect to them beyond that given by the mere agreement of the parties, the proceedings must be treated on the same footing for the present purposes as proceedings in litigation."[3]

In a case which was brought on appeal from the courts in Madras to the Privy Council the Privy Council confirmed the view taken by Coutts Trotter J., who declined to entertain proceedings brought in Madras to upset an English award. The learned judge said, "How a judge in

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[1] Dicey, *Conflict of Laws*, 4th ed., p. 364; Ralph Sutton, in Nussbaum's *Yearbook*, vol. i, p. 65.

[2] See Nussbaum, in his *Yearbook*, vol. i, pp. 16–17, for general preparation.

[3] Per Collins M.R. in *Croasdell* v. *Cammell Laird & Co., Ltd.* [1906] 2. K.B. 569.

Madras is supposed to have jurisdiction to upset an award made by an arbitrator in London passes my comprehension, and it is perfectly clear that the court which is given jurisdiction by the English Act is the English court."[1]

The conclusion is that the rules of law governing the effects of a submission and providing also for the supervision of the courts seem to be from the English point of view rules of procedure exclusively to be applied by the English courts and giving the English courts exclusive jurisdiction, so that no other court can apply them, nor may validly apply their own. The court " will also remember that the parties may have agreed to the submission precisely because of the discretionary power thus vested in the court. They may very well have said to themselves, ' If in any particular case it would be unfair to allow the arbitration to which we are agreeing to proceed, we shall have the protection of the court.' "[2] And *vice versa* the English courts would, on the view taken in Oppenheim & Co. (see note 1), be unable to apply their own law of procedure to foreign submissions. These conclusions must, however, necessarily be confined to the effects of a submission. Where, however, the enforcement of an award is concerned these conclusions, of necessity, cannot apply, as each country has to apply here its own law of procedure, whether foreign or its own awards are concerned. In an English action to enforce a foreign award pleas may be taken to defeat the effects of a foreign award on grounds arising under the foreign law governing the award[3] or under English law, as *e.g.* the Statute of Limitations, and accord and satisfaction.

If there is an arbitration clause under English law in a contract between an English firm and a foreigner, the English court has on application for the appointment of arbitrators under s. 5 of the Act an absolute discretion in dealing with that application and can attach any reasonable condition as to security and costs for the granting of the application.[4] If a party against whom it is sought to enforce an award is out of the jurisdiction it seems that an action on the award was the only proper remedy.[5] Since 1920, by Order XI, r. 8*a* of the Supreme Court service out of the jurisdiction of any summons, etc., to remit, set aside or enforce an award is possible, if the award is made in an arbitration held within the jurisdiction, and it would seem therefore probable that an award may be enforced by the Arbitration Act against persons out of the jurisdiction by the remedies provided.

(*b*) *German Law.*—Under German law a submission to arbitration under foreign law is valid, and generally an action lies to enforce a foreign award.[1] The German *Z.P.O.* does not mention foreign awards nor define them, and it seems that a definition is of little importance for the same reasons as advanced under English law, because the conduct of a reference in Germany will be almost conclusive as to the application of German law to the submission. Otherwise the general principle as to the finding of the proper law applicable to a submission is that the intention of the parties as indicated by the surrounding circumstances is the deciding element.[2] It has been suggested by a German legal writer of authority,[3] in finding the law applicable to a submission, to make the starting-point from the logical *prius*, *i.e.* the award to be made, as submission and award must necessarily follow the same law. So if a permanent institution of a country is made arbitrator, or an award is to be made in a certain country by the provisions of a submission, it would follow that the laws of that country are applicable to the submission. This was the method of the German *Reichsgericht* in a recent decision, where a Strassburg institution was made arbitrator.[4] The same method had also been applied by the English court in the Norske case (see note 2, p. 238). A German court must stay the proceedings or technically refuse an action, if a valid foreign submission is pleaded by way of defence, and it could not exercise the discretion of the English courts, where an English submission is in question, because this is clearly part of the law of procedure, and therefore inapplicable as *lex fori*. It seems that also under German law a foreign court may be made arbitrator and its decision may be treated as an award,[5] but in order to have this effect a clear provision in the agreement would be necessary.[6] A German court has no power to restrain a party from bringing or pursuing an action in a foreign court in breach of a submission under German law. Under German law the rules determining the validity of a submission as to form, content and capacity of the parties are considered substantive law, whereas the effects of a submission and the provisions of the *Z.P.O.* relating to them are law of procedure. So the position is very similar to that under English law. As to the enforcement of a foreign award in Germany, German law of procedure is exclusively applicable as *lex fori*,[7] but in regard to the proceedings in a foreign reference and the form of an award under foreign law the foreign rules apply as *lex fori*,[8] if their validity is attacked in a German action. So in an action on a Belgian award, which based its procedure partly on a judgment of a Belgian court in Antwerp, the German court held that although this judgment would not be recognized as such in Germany because of want of reciprocity with Belgium (§ 328, *Z.P.O.*), the award based on it was nevertheless good, if good according to Belgian procedure law.[1]

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[1] *Oppenheim Co.* v. *Mahamed Haneef* [1922] A.C. I. 487. The same attitude is taken by German courts (see later).

[2] Ralph Sutton in Nussbaum's *Yearbook*, vol. i, p. 58, dealing with the court's discretion to grant a stay of proceedings.

[3] *In re Bankers and Shippers Insurance Co.*, etc.; see note 2, p. 238.

[4] *Bjornstadt* v. *Ouse Shipbuilding Co.* [1924] 2 K.B. 673.

[5] Russell, *op. cit.*, p. 273.

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[1] *R.G.*, vol. 30, p. 368 ss., and Entscheidung des R.G. of December 22, 1911, in Teuffert's *Archiv für Entscheidungen der Obersten Gerichte*, vol. 67, p. 426, copied in Nussbaum's *Yearbook*, vol. i, p. 276.

[2] *R.G.*, vol. 30, p. 371.

[3] Jonas, editor of the last edition of Stein's commentary on *Z.P.O.* in *Juristiche Wochenschrift*, 1927, p. 1297.

[4] *Jur. Wochenschrift*, 1927, p. 1297.

[5] *R.G.*, vol. 36, p. 383.

[6] Under English law these effects would result without express provision. See In the *Cap Blanco* [1913] P. 130.

[7] *R.G.*, vol. 5, p. 399.

[8] *Ibid.*, vol. 30, p. 371.

A German court cannot set aside a foreign award because, besides other practical reasons, the foreign procedure law would then have to be applied, but a foreign award may not be enforced by a German court, as this is a question of German procedure.[2] In an action on a foreign award all the available defences under the foreign law may be pleaded, and therefore it seems that in an action on an English award in Germany the objections possible are wider [3] than they would be against a German award (see p. 228 ss.).

Under German law there does not seem to be any objection to apply the remedies of enforcement provided by the Code also to foreign awards. And this is also the view of the *Reichsgericht* in several cases.[4] The decree for leave to enforce will be granted if the foreign award complies with the formal requirements of § 1039, *Z.P.O.* as *lex fori*. They are, as we have seen, on pp. 230, 234 above, an award must be dated and signed by all the arbitrators. A copy of the award, signed by the arbitrators, must be served on the parties and the original award is to be filed with the clerk of the proper court together with proof of such service.

It seems that only a German court can be the proper court for the above purpose (Beschluss of the Court in Cologne, see note 4).

This practice of granting leave to enforce foreign awards was established before the statutory amendment of February 24, 1924 (*Imperial Law Gazette*, vol. i, p. 135 ss.), but since then difficulties have arisen. Before the amendment the remedy of enforcing awards (German and foreign) as provided by the *Z.P.O.* was an execution judgment after a hearing of the application, and an application for such judgment could be opposed for the same reasons as would entitle a party to have an award set aside by action. But by the statutory amendment of § 1042, *Z.P.O.*, the court may in a simplified procedure either grant leave to enforce or stay the motion if the defendant proves that he has instituted proceedings to set aside the award within the time fixed by the court ; but in both cases it cannot in this motion try questions of objections taken. Now in the case of foreign awards the proceedings to set aside an award can by German law only be taken in the proper foreign court. Therefore a German court would, since the Statutory Amendment, not be competent any longer to determine before its tribunal objections taken to a foreign award by way of defence as it was before. Therefore the conclusions have been drawn by Jonas[1] that foreign awards are not to be enforced by the simplified procedure of the *Z.P.O.* to grant leave to enforce, but only by action, as otherwise the position of the plaintiff would be unduly hard, as the stay on account of protracted proceedings in a foreign country court may cause great delay. The *Reichsgericht* considered the position arising under the new statutory amendment in a recent case, but left its own decision doubtful as it was not a point in issue.[2]

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[1] Decision of the R.G. of June 28, 1927, in *Jur. Wochenschrift*, 1927, p. 2312.

[2] Decision of the R.G. of February 22, 1927, in *Jur. Wochenschrift*, 1927, p. 1311. *R.G.*, vol. 116, p. 194, and decision of the R.G. of February 7, 1928, in *Jur. Wochenschrift* 1928, p. 1223.

[3] Decision of the *Oberlandesgericht*, Hamburg, of October 31, 1924; *Hanseatische Rechtszeitschrift*, 1925, p. 63, copied in Nussbaum's *Yearbook*, vol. i, p. 278.

[4] *R.G.*, vol. 5, p. 399 ; vol. 30, p. 368. Beschluss of Oberlandesgericht Köln of June 25, 1925, in *Jur. Wochenschrift* 1926, p. 1609.

The statement of Mr. Weiss in 43 *L.Q.R.*, p. 209, " On the whole the courts in Germany seem to be inclined to view awards obtained abroad with suspicion, and it happens, frequently enough, that notwithstanding the existence of the foreign award the party relying on it is compelled for some technical reason or other to start proceedings *de novo*," is without proper foundation.

If the simplified procedure should be refused in future to foreign awards there remains always the ordinary action to enforce a foreign award, and the position would be very much like that under English law with its distinction between the procedure of leave to enforce and of setting aside an award. In an action on an award the defendant will be able to plead[3] by way of defence all irregularities available under the foreign law in question (by analogy to § 1041, s. 1, *Z.P.O.*). Intentional disregard of compulsory provisions of the German law could, however, not be pleaded. As to the other sections of § 1041, *Z.P.O.*, applicable by analogy, the German court would have to apply German law, but as to ss. 4 and 5 a submission under a foreign law,which does not make the same formal requirements as under these sections may constitute a waiver of irregularities under these sections.

Under German law submission and award follow contract principles[4] and therefore an award which is valid according to the law under which the parties compromised has its immediate effect like any other contract if brought before a German court. It may be that the special simplified procedure of enforcement is refused if the award does not comply with the German rules, but as a contract it has its effect nevertheless. It has this effect without a foreign court interfering, and its effect is even stronger where a foreign judgment would not be recognized by a German court because of want of reciprocity. An order by the foreign court granting leave to enforce an award governed by its laws, as *e.g.* leave to enforce an English award by a Master of the High Court under s. 12 of the Arbitration Act, would not be considered as a judgment of a foreign court by German law (see decision in note below), not because of its form,[5] but because according to the German conception the English courts are not competent to grant leave to enforce with effect as against Germany. And this is, I submit, also the correct view in accordance with the English law, because the Arbitration Act did not empower an English court to grant leave to enforce an award outside the jurisdiction or to do constitutive acts such as to direct judgment to be enforced in accordance with an award, if leave to enforce is sought. The only power conferred under s. 12 is that "judgment may issue on the award." [1] This important distinction under English law clearly confirms the above view.

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[1] *Jur. Wochenschrift*, 1927, p. 1299 ss.

[2] Decision of the R.G. in *R.G.*, vol. 116, p. 194, and of Febuary 7, 1928, in *Jur. Wochenschrift*, 1928, p. 1223; see also Prof. Kisch in *Jur. Wochenschrift*, 1927, p. 1376, and Leo in *J.W.*, 1928, p. 1453, who consider the position unsatisfactory, but seem to admit the new procedure of § 1042, Z.P.O., also for foreign awards.

[3] *Jur. Wochenschrift*, 1927, p. 1229 s.

[4] Nussbaum in *Yearbook*, vol. i, p. 14, with legal literature quoted; *R.G.*, vol. 30, p. 370.

[5] *R.G.*, vol. 16, p. 428.

The Case of Merrifield, Ziegler & Co. v. Liverpool Cotton Association, Ltd.—The decision of Eve J. in the case of *Merrifield, Ziegler & Co.* v. *Liverpool Cotton Association, Ltd.* [1911] L.T. 105, p. 97, has received great attention by English legal writers, and is usually cited as authority in English textbooks [2] for the proposition that an award made by foreign arbitrators (better, foreign awards), which is by the law of the foreign country not enforceable without an order of the courts of that country, is not a judgment of a foreign tribunal, which can be enforced by action in English courts. This proposition, I submit, is correct as far as it goes, but it cannot be used to support the following propositions: (1) that a foreign award cannot be sued on in England without an enforcement order of the foreign country; and (2) that a foreign award, to which an enforcement order was granted by the foreign country, would be a foreign judgment, on which an action could be brought in England. The point in issue in the above case as far as it concerns us here was shortly stated as follows: An action was brought in the High Court to enforce a German award. The award was held to be binding and valid according to German law by the learned judge at the trial, but the action was dismissed, because the plaintiffs had not affirmatively proved that under German law a German submission imports an implied contract to perform the award, and failing this the German award could not be held to be a foreign judgment which the English court would recognize as such.

Whilst the ruling of the learned judge that a German award is not a foreign judgment is correct, the other considerations, I submit, cannot be followed for these reasons:

(1) Under English law an English submission imports, as we have seen, an implied promise to perform the award. This implied contract is one by implication of law, not by implication of fact,[3] and is nothing else than

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[1] *In re Willesden Local Board and Wright* [1896] 2 Q.B. 417; Russell, *op. cit.*, pp. 267–8.

[2] Russell, *op. cit.*, p. 274; Dicey, *Conflict of Laws*, 4th ed., p. 433; Bacon, *Commercial Arbitration*, pp. 114–15; but, more correct, Westlake, *Private International Law*, 7th ed., by Bentwich, § 331 a.

[3] Thus an action may lie against a defendant for an implied contract for money had and received though he may have protested against such a contract. *Gore* v. *Gibson* [1845] 13 M. & W. 623–626. In a different category are the contracts implied by implication of fact. They are real contracts.

law in the ordinary sense, but not a contract. As Lord Mansfield puts it in an early case,[1] "If the defendant be under an obligation, from the test of natural justice, to refund, the law implies a debt and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract (*quasi ex contractu*, as the Roman law expresses it)." Lindley L.J. says[2]: "Owing to the unfortunate terminology of our law . . . the expression "implied contract" has been used not only to denote a genuine contract established by inference, but also an obligation which does not arise from any real contract, but which can be enforced as if it had a contractual origin. Obligations of this class are called by the civilians obligations *quasi ex contractu*." I submit that this legal rule of an implied promise to perform an award is not, or at any rate not solely, an institute of the English substantive law, but one which is equally adjective law or law of procedure. In support of this view I quote Odgers on the Common Law, 3rd ed., vol. ii, p. 305: "The law, therefore, in order to give the plaintiff a *remedy*, assimilates to contracts certain cases in which there clearly is no contractual relation whatever between the parties. These we may best describe as 'quasi-contracts,' for that term in itself denotes that they are not contracts at all, but that the law will treat them as if they were. The *remedy* is analogous to, and in the form of, an action on a contract, because otherwise no remedy would exist." That the view taken above is correct becomes very clear when one considers the nature of a contract implied by English law to satisfy a foreign judgment. If the quasi-contract were substantive law then inquiries would have to be made whether the foreign law also implies a quasi-contract. These inquiries cannot be made because they would be against the purpose of this rule of law. Therefore the right inference to be drawn is that in the case of a foreign judgment the implied quasi-contract is part of the law of remedies, and in the case of an implied contract to perform an award, the conclusion cannot be different for the above general reasons. The result is that an English court cannot in an action to enforce a foreign award inquire whether a foreign submission has, by the foreign law, the effect of giving rise to an action on the award, but the English court has to apply its own law of procedure. Any such inquiry is even more clearly excluded if by the foreign law the remedy of an action on the award is conceived to be law of procedure.[3] In my view there is in fact no quasi-contract imported into a German submission by German law. The German law did not build up any such construction ; all that it did was to give a remedy to enforce a foreign award. The German *R.G.* says literally[4]: "If it is legal to refer disputes to foreign arbitration, there must be a way to give effect to the contractual intention of the parties, if there is an award valid according to the foreign law, although not complying with the provisions of the *Z.P.O.* This way is the present action, which seeks for the performance of an award made in accordance with the submission. The necessity for such a remedy has already been urged by the *Reichsoberlandesgericht.*" By a curious chance this decision was in a case on an English award, and the German *R.G.* rightly did not even put the question whether an English submission imported a quasi-contract to perform an award. We have already seen on p. 237 that the remedy by way of action is as a rule refused to German awards by reason of the principle of economy prevailing in the German law of procedure. But that would not justify the conclusion—if there were really quasi-contracts of the nature of substantive law in both countries—to refuse to a German award in England an action on an award, because the German procedure provides for its own awards a more economic and simplified method of enforcing.

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[1] *Moses* v. *Macferlan* [1760] 2 Burrows, 1005, 1008.

[2] *In re Rhodes* v. *Rhodes* [1890] 44 Ch.D.P. 107.

[3] *R.G.*, vol. 30, p. 371.

[4] *Ibid.*

In concluding, I submit respectfully that the decision in the *Merrifield, Ziegler*, etc., case labours under the defect that the English judge did not apply the English law of procedure, but made inquiries as to the foreign law of procedure.[1]

(2) But there is another consideration in the decision which requires comment. It seems that the court would have been prepared to treat the award as a foreign judgment if an enforcement order could have been made in Germany. The enforcement order would have been in 1911 still in the form of an enforcement judgment, and all grounds for setting aside could have been pleaded by the defendant in the course of this litigation. But I submit that an enforcement judgment should not have been treated by the English court like a foreign judgment any more than to-day a simple decree for leave to enforce ought to be so regarded. The formula of a German enforcement judgment before 1924 was simply[2] "Execution may ensue out of this award . . .," and the same formula is still used to-day.[3] This is clearly not a foreign judgment *in rem* or *in personam*, which the English courts could recognize. It certainly does not condemn a party to pay a certain sum,[4] and it is not the judgment of a competent court, because only an English court can give leave to enforce an award or allow an action on an award with effect for England. Therefore I think the principle *Exequatur sur exequatur ne vaut*[5] holds good for English law.

The proper conclusions, therefore, are that an English court cannot for the enforcement of a foreign award require an enforcement order of that country, and if such an enforcement order should have been given it is without value for proceedings in an English court. It cannot be denied that an enforcement order of a foreign country in respect of a foreign award may seem to save an English judge the very difficult task of examining a foreign award from the point of view of the foreign law; but what if the foreign enforcement order is only a clerical one without entering into the merits as in Belgium (Code de proc. civ., Art 1020) or a litigious one but not on the merits, as in Germany? In an action on a German award before an English court the court may have to consider only in one instance and incidentally whether a German enforcement order was made, because according to German law, § 1044, the right of the defendant to bring an action to set aside an award may be extinguished by lapse of time, and he would therefore be unable to raise objections before an English court after the lapse of that time.

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[1] Oppenheimer, in commenting on the decision in Nussbaum's *Yearbook*, vol. i, p. 289, does not touch the root of the problem, but cites a decision of the *R.G.*, which apparently relates to German law of procedure. In the subsequent comment, p. 295 s., on the case *In re Bankers and Shippers Insurance Co. of New York* v. *Liverpool Marine and General Insurance Co., Ltd.*, he does not show whether the American law imports a quasi-contract into the submission which would be against the conclusions drawn by him.

[2] Sydow-Busch, *Z.P.O.*, 16th ed., p. 918.

[3] Stein, *op. cit.*, vol. ii, p. 1067.

[4] Dicey, p. 433 ss.; Westlake, p. 394 ss.

[5] Nussbaum, *Yearbook*, vol. i, p. 31.

The only possible way [1] to treat awards is according to the principles applying to contracts, and any other principle would destroy the great scope which arbitration offers for giving effect to foreign awards where judgments for reasons of sovereignty and also the doctrine of reciprocity could not be effectual in the foreign country.

From this aspect the decision in the case of *Merrifield, Ziegler*, etc., is a great danger, as is shown by the conclusions drawn from it by English legal writers.

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[1] Nussbaum, *Yearbook*, vol. i, p. 14. The doctrine of contract is prevalent in Belgium, France, Germany and Holland.

THE PUBLIC LAW SYSTEM OF THE SOVIETIC DICTATORSHIP.

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THE present political government of Russia may be taken as an unprecedented phenomenon of common law.

When we consider the ancient despotisms of the East, we find in them nothing, except certain theocratic elements, that can specially interest the jurist or the sociologist from the point of view of the doctrine of common law. The ancient Eastern despotisms, being founded on a national or religious principle, originated no doctrine of the absolute power of the State. Eastern despotism is a material fact rather than a legal principle, while the Sovietic power is a system. And the study of this system offers unquestionable historical and legal interest.

Not only does the Sovietic State disown democracy, but it is putting into practice the attempt to create a State on a basis of anti-democratical principles. Despotism, as a general rule, did not care to disown the principle of liberty or equality. In the cases where the caprice of a tyrant mowed down heads, he did not deny the rights of the man and the citizen: he simply ignored them; and the ruling power sought in no way to triumph theoretically over democratic ideas. The Sovietic State, on the contrary, possesses a real system founded on principles opposed to those of democracy: it is an isolated doctrine, a special legislation, a legal logical process that has no parallel.

The Modern Legal System.—The classical controversy as to the relations existing between law and government, law and State, a controversy which has given birth in literature to a whole series of interesting definitions, is settled by the Sovietic legal system in the simplest and most precise way. In expounding the Sovietic Constitution, the official commentators disown the legal character of government. The Marxist theory has supplied Sovietic legal science of to-day with important documentary material on this subject. We find in fact in the works of Marx and Engels numerous texts that not only deny the intrinsic value of law, but consider the power of the State as a means of coercion inherent in the capitalist form of industry. In classical Marxism, the idea of the negation of the legal character of the State is closely connected with that of the temporary character of the State itself which is doomed to disappear. (The dictatorship of the masses is, according to Marx, to be only a temporary stage, that will lead to the winding-up of the State rather than to its reform.) In the course of its historical evolution Bolshevism, while refusing to admit that a State will be a necessity in the future, was obliged to recognize the necessity of a momentary organization. The dawn of a universal social revolution being indefinitely postponed, the Sovietic doctrine finds itself obliged to project, not a transitory historical form, but the crystallization of the Sovietic State. Hence the numerous contradictions between a whole series of constitutional acts of the years 1917 and 1918 on the one hand, and on the other the more recent acts ranging from the declarations of a general character issued in the first months of Bolshevism to the Sovietic doctrine of to-day. We find a contradiction of the same type in the pre-eminence given to the political power over the economic organs, which is opposed not only to the first declarations of the government of the Soviets, but to the whole Marxist theory. The original Sovietic doctrine pronounced itself in agreement with the Marxist conception of the functions of the State, and if historical materialism denies the intrinsic value of law and the State, if all historical development reduces itself to an economic phenomenon, government by individuals, as Engels writes, is replaced by the administration of affairs and the organization of the means of production. As Lenin wrote, the communist State is distinguished by a great simplification of governmental functions : it is stripped of all its political elements, it creates a purely economic organization directed by " the workers, the overseers, the accountants." Supremacy of the economic character over the political character (which gives the image in a certain sense of Proudhonism), such was the official point of view of Bolshevism at its origin. But the detailed and rigorous control of all the aspects of life and the uncompromising bureaucratic outlook of the Sovietic government give the image of absolute authority. This State, which gradually relaxes the suppression of private enterprise and is defended by an army of political police, as powerful as it is vigilant, is an example of the complete ascendancy of political elements over economic elements. Here we come upon the profound gulf which separates the theory of the Sovietic State from practical legislation. This theory had been evolved in view of a State formed of " workers, overseers, accountants," but practical legislation, that is, life, has evolved an overgrown political organism that entirely dominates the economic machinery. In studying Sovietic common law, we must never lose sight of these profound divergencies between idealism and practice, the theory proclaims the disappearance of the State to make place for economic science, but in practice the idea of power entirely dominates the ancient dogma of economic organization.

While the Sovietic theory disowns the intrinsic value of law, the State is considered by the Sovietic legislator and lawyer as a dictatorship that is above law. A Sovietic theorist declares that " law is nothing but support accorded by the State, a means of coercion appertaining to the State, benefiting the ruling class, and regulating, in the interests of that class, the conduct of all the members of the society." [1] In enumerating the various definitions of communist dictatorship, for instance that of Lenin, "a dictatorship untrammelled by any law, an absolute rule, a power that is based directly on violence," [2] the Russian critic observes: "The practice of violence is revealed in all its nakedness, without any idealistic veil, from this point of view the Sovietic rule is a unique phenomenon in the history of mankind, a phenomenon of which the study offers exceptional interest." [3] Gourvitch, the official Sovietic commentator, defines [4] in the following way the character of the Sovietic State in its relation to the general theory of law. "The economic interest of the ruling class is the active principle and fundamental law of the State." The State being a fact, the fact of the power of a certain class, and law having no independent importance, according to the author just quoted, the Sovietic Constitution differs from all other Constitutions: it is the resultant of a vital development and not of constructive theories.

Gourvitch, in support of this view, points out that the Sovietic State lived for a long time without any constitution, the Constitution of the R.S.F.S.R. (*République Socialiste Fédérative Soviétique de Russie*) being published only on July 10, 1918; that is, nine months after the Bolshevik armed rising. So, still according to Gourvitch, the Sovietic Constitution has "created nothing," all it has aimed at has been political propaganda and agitation. "The State," adds the author, "does not stand out as the fertile collaboration of equilibrium and harmony"; it is the relation of power and slavery, "the power of the State is above all things a symbol of violence." [5]

We find in the work of Gourvitch the theoretic foundation of the Sovietic refusal to admit the separation of powers in the Sovietic State: "The Sovietic Constitution makes no distinction between the legislative functions and the executive functions, and undertakes no more than to confer on certain organs and in a limited measure the different dimensions of executive and legislative power." [6] Thus the notion of the separation of powers is replaced by an unsound legal idea: the idea of "dimensions of power." The fact of replacing the principle of "separation" by that of "dimension" enables us to affirm once again that Sovietic law is ignorant of the very idea of legislation. Gourvitch insists on the fact that the Sovietic Constitution is obliged to recognize the principle of "unity of power," and that the separation of powers is in contradiction with "the interests of the working class." [7]

The Sovietic doctrine rejects the principle of the separation of powers as incompatible with the "unity of class," with the dictatorship of class;

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[1] D. Dembsky, *La Morale et le Droit au point de vue du Matérialisme historique*, 1925, p. 81.

[2] Lenin, *Œuvres complètes*, t. XVII, Moscow, 1924, p. 361.

[3] Prof. N. N. Alexéieff, *Le Droit de la Russie soviétique. Recueil des articles des professeurs de la Faculté russe de Droit à Prague.* Prague, 1925, p. 35.

[4] In his book *Les Principes de la Constitution soviétique*, 1923, p. 12.

[5] *Op. cit.*, pp. 15, 23, 27.

[6] *Op. cit.*, p. 79.

[7] *Op. cit.*, p. 79.

and this dictatorship, which has uncontrolled power at its command, pays hardly any further heed to this principle, as far as the defence of the rights of the citizens and the limitation of the prerogatives of the State are concerned.

The Principles of Sovietic Law.—As we have already noted, Sovietic law has no characteristics, formal or substantial. Sovietic law is an act of power, not a general rule based on the principle of the rights of others. The principles of Sovietic law have not the character of laws, not only because of the disavowal of the separation of power and the absence of legislative power properly so called; the Sovietic law itself has no legal characteristics, substantial or formal.

According to the Sovietic conception, law has only an " instrumental " character, and the Sovietic doctrine is entirely hostile to " middle-class fetishism " towards the law. Such was the opinion of Lenin on the essence of law.

The Sovietic legislator, freed from all restraint of formal judgments, displayed an immense legislative activity, publishing " laws," " decrees," " ordinances," " codes," etc. The " instrumental " point of view was supreme in theory and in practice. " The decrees," wrote Lenin, " are instructions, summonses to the practical task in common. . . . Their aim is to teach practical work to those hundreds, thousands and millions of human beings who lend an attentive ear to the voice of the Sovietic power. . . . They must not be considered as hard-and-fast ordinances, to be put into practice immediately at any cost." [1] A theorist of Sovietic law characterizes the theory of " instrumental " law as the " juridical relativism " of Sovietic law. " Contrary to the champions and idealists of the French Revolution, Lenin, far from raising revolutionary law to the level of a fetish, on every occasion puts men on their guard against an interpretation of revolutionary law as an absolute standard of what is right, before everything else he dwells upon the technical side of law, and not on its standardizing and moralizing function. . . . We believe that the legal formula most in accord with the idea that Lenin conceived of the revolutionary decree would be the following. *The revolutionary decree is an administrative instruction.*" [2]

La Nouvelle Politique Economique, or the N.P.E., marked a stage in the development of the Sovietic law. The period of " integral communism " was typical owing to the complete negation of the importance of legal standards and the total absence of hierarchical standards. But the *Nouvelle Politique Economique* was obliged in later years, by the force of circumstances and by the social conditions of life in Russia, to lay before the Sovietic power the question of legality, or, as Sovietic politicians and lawyers express it, " revolutionary legality." Lenin himself had already spoken of " a sea of illegality." Sovietic journalists now frankly own that the only policy feasible in a country where the immense majority of the population is formed of peasants would be the policy of "keeping one's eye on the country districts," and that this policy would necessitate a bracing-up of legality. Lenin himself was obliged to abjure partially the "legal relativism," in its completeness, of his doctrine. "The Sovietic laws," he wrote in 1921, "are excellent because they give everyone the chance of fighting the bureaucratic system and red-tapeism. But who takes advantage of it? Almost no one. Laws have been drawn up *ad libitum*. Why then does this struggle remain unfertile of results?"[1]

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[1] Lenin, t. XVI, p. 149.

[2] Arkhipov, *Les étapes principales de l'évolution de la conception de la loi soviétique. Le Droit soviétique.* Moscow, 1925, No. 5, p. 22.

After the appearance of the *Nouvelle Politique Economique*, the problem of legality became the ordinary theme of discourses and lectures in the Sovietic institutions and the congresses of the communist party. The political tactics of the Soviets led them to present this problem under the form of the reconciliation of two opposite tendencies, legality and conformity with the aim, or, to employ the Sovietic phraseology, "revolutionary legality" and "conformity with the revolutionary aim."

This manner of approaching the problem is based on the idea of conformity with the aim, as are all investigations into legality, as well as the desire to establish revolutionary legality firmly. It was in pursuing the political aim of getting into touch with the country districts and winning the favour of the peasants, who form an overwhelming majority of the population of Russia, that the Government was faced with the problem of "legality." We are witnessing a most curious social and legal phenomenon, a political rule which denies legality and the rights of others and possesses no laws in the formal or substantial sense and maintains itself entirely on administrative ordinances, enactments of a dictatorship . . . this government seeks to establish "legality," but, with that, not to change the nature of its common law. This is perhaps one of the most interesting experiments in the history of law, and we think it right to draw attention to it. In the train of Lenin, who transformed himself into a "partisan of legality" from being a "relativist," the Sovietic writers set themselves to demanding the enforcement of legality, without which, they said, it was impossible to satisfy the country population. "The idea expressed by Lenin in 1921 of the scope of legality remains to the present day the directing and even regulating principle of the Sovietic legislation; when you peruse the constitutional legislation of the epoch of the new economic policy, you are bound to recognize that the problem of law and legality is perhaps at the fundamental root of it."[2]

The VIth Extraordinary Congress of all the Russias came to a significant resolution and ordinance concerning "the scrupulous execution of the laws." This ordinance is interesting as showing the state of mind of the Sovietic rulers. As the Sovietic theorist explains, this ordinance

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[1] Lenin, t. I, pp. 382-3.

[2] Arkhipov, *Les étapes principales*, p. 31.

"is not based upon some abstract moral principle, but on the principle of conformity with the social aim." The more so as, re-establishing legality, this ordinance all the same calls attention to the fact that "in a series of cases, infraction of the laws may be as conformable to the aim as the strict execution of the principle of legality."[1] The dilemma of Sovietic law consists in the opposition between legality and conformity with the aim; but the supreme organ, the organ that holds the constitutive power, declares that the infraction of the laws is sometimes more in conformity with the aim than their execution. So the first attempt to introduce legality into the life of the Sovietic State fell through. Succeeding attempts gave hardly any more results and the Sovietic writer before quoted remarks: "In summing up these ordinances (of the VIth and VIIth Congresses), it is necessary to note that their essential scope consists in the identification of the idea of legality with that of the execution by subordinate organs of the ordinances, injunctions and orders of the superior organs; legality is therefore, if not identified with, in any case closely assimilated to, the discipline of a State machine."[2] It is here a question, not of legality, but of discipline and subordination alone. The confusion was not dissimulated into which at this time the Sovietic State was plunged by the "local power" exercised by the local authorities who, in their resolutions, took no account of the ordinances of the central authority. In the next place the VIIIth Congress issued the ordinance which prescribes that the Central Executive Committee alone, its Presidents and the Members of the Council of the People have the right to promulgate decrees of a general order. Certain Sovietic authors thought that they saw here the institution of a formal code of Sovietic law; but the author above quoted remarks with reason that such an interpretation would be false, a formal definition of the law "being incompatible with the bases of Sovietic law."[3] Allusions to legality and aspirations after it are to be met with here and there, but the theory, the theory that faithfully reflects the practice, remains unshaken.

The Sovietic State has for its base the supremacy of conformity with the aim over legality and of fact over law, the communist party is identified with the State.[4] The idea of Lenin, according to which the Sovietic institutions and those of the party are identified, is expressed in the clearest manner by the Bureau of the People or the Foreign Office, or still better by the People's Bureau for the Inspection of Workers and Peasants.[5] The resolution of the XIIth Congress of the communist party, for example, lays it down that "the division of labour between the organs of the party and those of the State is, of course, necessary, but it should cause no impediment to the preponderating rôle of the party."

The supremacy of conformity with the aim over the law has so completely impregnated the whole system that the tribunals are not constrained to apply the law invariably, but in a series of cases they are recommended to let themselves be guided by the idea of conformity with the aim. " The Sovietic doctrine cannot admit that the legal and governmental organs are associated by the laws; from the Sovietic point of view this is an absolutely false idea based on the famous theory of the separation of powers." [1] Art. 4 (*a*) of the Code of Criminal Inquiry allows of the classification of penal cases which do not conform with the aim, etc.

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[1] Arkhipov, *op. cit.*, p. 24. [2] *Op. cit.*, p. 25. [3] *Op. cit.*, p. 27.

[4] Stoutchka, *La Théorie de l'Etat, du Prolétariat et des Paysans*, 5th edition, Moscow, 1926, pp. 216-17. [5] Stoutchka, *op. cit.*, p. 230.

But the problem of bringing legality and conformity with the aim into accord is still under examination. Revolutionary legality is considered a watchword and " its violation, even with the best intentions, must objectively be taken as an act of counter-revolution." [2]

The XIVth Congress of the communist party has again demanded that legality shall be guaranteed in law and the administration. A practitioner in Sovietic law has given a special lecture on this subject at the Institute of Sovietic Construction. This lecture has subsequently been published in a Moscow legal review.[3] The author severely criticizes the idealists, official practitioners of law under the Sovietic government, who deny the very idea of law, and assert that " Religion and law are attached to the idealism of the class of oppressors and these ideas take each other's place in rotation. . . . Every intelligent member of the lower classes now knows, or at least has heard it said a hundred times, that religion is an opium for the people, but I believe that only few persons realize that law is an opium for this same people, but much more poisonous and deadening." [4] The Sovietic author criticizes this theme, and points out the danger of such a pronouncement in a country where the idea of law is already sufficiently weakened owing to historical conditions. He then passes on to another conception, an official one this time, held by a Sovietic magistrate whose theory it is that in every concrete case the leading principle of the law is to be verified from the point of view of its conformity with the revolutionary aim. He does not for that reason deny that Sovietic law is such a principle, but " the idea of conformity with the aim should dominate the legal form by virtue of its supremacy over law." The author quoted criticizes this point of view, and from an analysis of practical work deduces the necessity of strengthening legality with as little delay as possible: for illegality " has the most serious consequences by making a bad impression on the peasants, provoking their murmurs and indignation and constituting one more obstacle to the revival of agriculture." [5] We have expressly quoted this testimony not of a "theorist" but of a practician invoking legality for no reasons of principle, but from fear of "murmurs and indignation" and in the interests of agriculture. All considerations of principle are strange to him, and his testimony gives a proof of the failure of all the attempts to strengthen "revolutionary legality."

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[1] Stoutchka, *op. cit.*, p. 228.

[2] Yljinski, *Les catégories de la Justice et de la Légalité dans le Droit soviétique. Le Droit soviétique.* Moscow, 1926, No. 2, p. 5.

[3] Yakontov, *De la Légalité révolutionnaire. Le Droit soviétique.* Moscow, 1926, No. 1.

[4] *Yakontov, op. cit.*, pp. 9–10.

[5] *Op. cit.*, pp. 11–12.

The impossibility then of instituting legality, given the supremacy of conformity with the aim over law, is, as we have established, recognized even by the Sovietic writers.

Declaration of Rights.—Following the historic example of the French Revolution, the Sovietic Revolution too has made a Declaration of Rights.

The first Sovietic Constitution was published on July 10, 1918.[1] But before this date, on January 16, 1918, there had appeared a *Declaration of the Rights of the Working-man in Service.* This formed the first part of the Constitution. The document, drafted by Lenin, is considered by Sovietic writers the most complete constitutional document of the first period of the Sovietic revolution. "The *Declaration* has had an enormous revolutionary value," to quote the words of an official commentator. "Its importance far outweighs that which attached in its time to the *French Declaration of the Rights of the Man and the Citizen.*"[2]

Here then is a document that we are invited to compare with the Declaration of 1789. Since the second part of the Constitution does nothing but continue the Declaration and defines the general principles of Sovietic common law, we have to analyse the Declaration at the same time as the second part of the Constitution.

In the Sovietic Declaration it is not only the habitual list of liberties that we fail to find, but no mention is made of the principle itself of the individual rights of the citizens. This declaration is an example, not of imitation, but of the unparalleled extension of the rights of the State at the expense of the citizens. It is rather a declaration of the rights of the State than of those of the citizens.

The second part, which completes the Declaration, enters more closely into the question of individual rights. Art. 13 accords "the liberty of religious and anti-religious propaganda." Further on, "to assure to workers the genuine liberty of expressing their opinions." Art. 14 proclaims that the State puts into the hands of the working class all technical and material means of editing newspapers, pamphlets, books and all other printed matter.

To guarantee the "genuine liberty of meeting," Art. 15 "puts at the disposal of the working class and the poorer peasants all premises that can serve for popular meetings, with furniture, light and heating."

Art. 18 lays down the principle, "If a man will not work, neither shall he eat." Art. 23, the most typical as regards the definition of individual rights, is thus framed: "Guided by the interests of the working class as a whole, the Russian Socialist and Confederate Sovietic Republic deprives certain individuals and certain groups of their rights, which they use to the detriment of the interests of the Socialist revolution."

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[1] Yakontov, *op. cit.*, pp. 11–12.

[2] Touroubiner, *La Constitution de la R.S.F.S.R.*, 1925. *Le Droit soviétique. Revue de l'Institut du Droit soviétique.* Moscow, 1925, Nos. 6, 18, p. 16.

As we see, the Sovietic Declaration established no individual rights and did nothing but map out the domains of the State monopoly. The power of the State is thus not limited in favour of the unforfeitable rights of the citizens; on the contrary, it is the State that becomes all powerful and of unlimited authority. One of the commentators of the Declaration expresses himself thus, " In reality, there is no question here of rights, but of the enumeration of the tasks incumbent on the socialist government." [1]

The Declaration of 1918 was very soon out of date. The new economic policy (the Nep), which was the renunciation of the original programme of uncompromising communism, made of the Declaration, as the Sovietic writers express it, an " historical document," and indeed Lenin himself, shortly after its publication, had baptized it " a child of the revolution in a very bad hat."

When the Constitution of the R.S.F.S.R. was revised in 1925, the question of the declaration assumed the highest importance. Its text was so entirely in opposition to the Sovietic reality that the new Constitution of May 11, 1925, contains no more Declaration at all. All that is done is to mention in Art. 1 that " the Constitution springs from the fundamental principles of rights of the working people in the service of others."

The new economic conditions show their influence also in the changed framing of several articles. Art. 6, for example, is drawn up in the terms of what was formerly Art. 15, but while furnishing the premises for meetings, the Government gives no more pledges as to " furniture, light and heating." The phrase, too, " If a man will not work, neither shall he eat," is no longer to be found. In the new social conditions, the Declaration has lost its juridical signification, and is in contradiction with the new legislation. The only article that remains in force is Art. 14 (formerly Art. 23) which treats of the privation " of certain persons of certain groups of their rights."

On personal security, the right of meeting, the right of association, the press, liberty of conscience, etc., we find information, not in the constitutional texts, but in the diverse and numerous legislative acts. As the notion of law in the substantial and formal senses is unknown to Sovietic law, the term " legislation " can be employed only with a certain reserve. Even the functions of the constitutive power, for the revision of the Constitution, are strictly confined to the Council of the Delegates of the People, a Council that may be compared to the Council of the Ministers of the Occidental States.[2]

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[1] Reisner, *L'Etat bourgeois et la R.S.F.S.R.*, Moscow, 1923, p. 333.

[2] Diablo, *Le Développement de la Constitution de l'U.R.S.S. dans l'Evolution de la Pratique constitutionnelle. Droit soviétique.* Moscow, 1926, No. 3, pp. 35–8.

The case is even more difficult when we enter the domain of ordinary legislation. It is impossible to draw the boundary line between the law and the decree, between the intention of the legislature and the ordinance of the administration. When Sovietic law is named, all this means is the totality of the principles that have a restrictive force. The difficulty of investigation arises from the abundance of these principles, which are often contradictory or directed to the same object.

The non-existence of the separation of powers, the absence of the delimitation of the competence of the different organs, the confused distribution of the authority of the central federal power of the U.R.S.S. and the diverse federated republics; in addition to this, the feverish haste with which the Sovietic legislator issues laws, decrees, entire codes, themselves rapidly modified by other legislative acts, everything renders a systematic study of the Sovietic regime extremely difficult. What is forbidden in Moscow is authorized in the provinces and *vice versa.*

Individual Liberty and Security.—The notion of equality is quite strange to Sovietic law. The entire population of Russia is divided into "workers" and "non-workers." This second group is not only deprived of political rights, as we shall see when we study the franchise, but even in the domain of individual rights the "non-workers" are left absolutely without defence.

The distribution of the people into these two groups is often made to depend on accident of birth. Privation of rights affects not only the "non-workers" but also persons of "middle-class origin." Young men are not admitted to pursue advanced studies, because they are of "middle-class origin." Penalties for common law misdemeanours are different accordingly as the delinquent is a "worker" or a "non-worker by birth," etc. Further, no legal limit is fixed beyond which the "non-worker's" birth ceases to count.

Among the "workers" there exists a privileged group, that of the members of the communist party. This party, even in the official acts, is identified with the government itself of the Soviets. The members of the party enjoy a whole series of prerogatives in Sovietic law, and it is exactly upon individual rights that these prerogatives bear. Thus, by the decree of July 6, 1922, the publications of the Central Committee and of the governing committees of the communist party are dispensed from censorship. The instruction of August 10, 1922, makes a previous authorization unnecessary for the communist congresses, etc.

Of course, individual liberty and the security of persons did not exist during the period of systematic terror. A decree of the Council of the Delegates of the People, September 5, 1918, proclaimed the "Red Terror." This decree ordained in the most general terms that "all individuals making part of organizations of White Guards and having a share in plots and risings should be shot," and sanctioned wholesale massacres by order of the administration. The Red Terror was worked by functionaries of the famous Tchéka. This period is evidently outside analysis from the legal point of view.

In accordance with a decree of February 6, 1922, the Tckéka was replaced by the State Political Administration, called by its initials in Russia the Guépéou. It is the supreme police organization and has its sections with special military detachments in all Russia. Although Art. 5 of the Code of Criminal Procedure lays down that " no person can be deprived of his liberty or put under arrest, except in cases specified by law," the Guépéou nevertheless has the power, in virtue of Art. 7 of the decree of 1922, to arrest any person and imprison him for two months. Further it has the right of demanding from the Presiding Board of the Central Executive Committee the authorization to have recourse to a longer " isolation."

Persons arrested by the Guépéou are either brought before the tribunal or are exiled by an administrative measure, a penalty that was familiar to Russian jurisdiction in the epoch of Tsarism. Exile by administrative order was established by the decrees of August 10 and October 16, 1922, and put into final form by the instruction of January 3, 1923.

At the Home Bureau there exists a special commission that is charged with decisions relative to exile. Exile is fixed at three years, and the sentence is served in distant regions of which the list is made out by the Presiding Board of the Central Executive Committee. Exiles are deprived of their electoral rights during their sentence, and are under the constant supervision of the organs of the Guépéou.

By decision of the Presiding Board of the Central Executive Committee, dated October 16, 1922, there was instituted the penalty of " administrative exile in hard labour camps, for a maximum period of three years." That is to say, that by an administrative decision any citizen of the Soviets may be imprisoned and set to hard labour. This measure is extended to members of " anti-sovietic parties." The exile is given a maximum delay of two weeks to regulate his private affairs.

If we are to trust an official commentator [1] the organization of the Guépéou, dated March 28, 1924, has still further augmented the rights of the Guépéou in this respect, in particular for " persons guilty of economic counter-revolution." The preponderating rôle in the carrying out of the sentence is played by the organs of the Guépéou, and this settlement, after the testimony of the Sovietic lawyer, " has not been rendered public." That is to say, the organs of the Guépéou can send persons to hard labour for acts which are not only innocent from the legal point of view, but have not even been brought to the knowledge of the public.[2]

The Sovietic lawyer quoted above defends all these measures by saying that " there can be no question of according any guarantees whatever to a class of profiteers who are on the way to annihilation."[1] It is to be remarked that in the case of armed bandits arrested on the scene of their crime, Art. 1 of the decree of 1922 gives the agents of the Guépéou the right to shoot the criminals on the spot. Thus the Guépéou is authorized to shoot political criminals, and, as the press reports, it uses its prerogative fairly often.

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[1] Elistratov, *Le Droit administratif de la R.S.F.S.R.*, Leningrad, 1925, p. 88.

[2] Sovietic legislation does not recognize the principle of the compulsory publication of the laws. V. Mirkine-Guetzévitch, *La Théorie générale de l'Etat soviétique*, Paris, 1928, p. 80, etc.

After having indicated the prerogatives of the political police, it is scarcely necessary to enumerate the prerogatives of the other members of the administration in regard to arrest, domiciliary search, etc. For the simple reason of belonging to formerly existent political parties, exile to a hard labour camp—that is to say, one of the most rigorous penalties in Europe—is inflicted by the organs of the political police, without this decision being brought to the knowledge of the public.

Besides these extensive powers of the Sovietic administration in the province of the violation of individual rights, Sovietic law contains special provisions that enlarge still more the discretionary powers of the administration. The decree of March 8, 1923, created martial law and the state of siege. These may be proclaimed, not only by the central authorities, but also by the executive committees of the government, and even by the Presiding Boards of the executive committees of government "in cases where they cannot confer with the central authorities or when the course of events admits of no delay."

The administration receives the right to make arrests, to condemn to hard labour, to forbid the ingress and egress of citizens, to expel, to proceed to partial or total confiscation of private property, etc. The Sovietic measure of March 8, 1923, reproduces, almost literally in certain places and very closely in its entire text, the famous *Réglements relatifs à la sûreté de l'Etat* of 1881 and the measure of 1892, that is to say, measures taken under the government of the Tsar.

Control of the Press.—It was only under the sway of the Nep, when private publications were issued, that the question of the control of the press was raised. The anti-sovietic press had been suppressed in the summer of 1918, and, as far as newspapers go, the situation has not altered ; but since the rise of the Nep a decree dated December 12, 1921, has accorded certain facilities to some publishing houses on condition of their obtaining the authorization of the "*Gozzidat*" (*Les Editions d'Etat*) in every instance.

"The increasing number of private editions," writes the Sovietic commentator, "renders it indispensable to organize a systematic supervision of the press, and particularly to proceed to a previous examination by the censorship of printed publications."[2] The decree of June 6, 1922, created the "General Control of Printed Works" with the local sections, and this bureau exercises the censorship on the board of which the political police, that is, the Guépéou, is represented.[3]

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[1] Elistratov, *op. cit.*, p. 6.

[2] *Op. cit.*, p. 118.

[3] Instruction of March 30, 1923, § 1.

This institution " exercises the censorship in all its forms, military, political, idealist, etc." It is empowered to deliver authorizations, to publish printed works, to keep the register of forbidden works, to supervise libraries. Paragraph 8 of the Instruction of December 22, 1922, gives the General Control of Printed Works the right " to stop certain publications, to restrain output, and also to close publishing houses in case of clearly proved criminal activity, the chiefs responsible are brought before the tribunal or the matter is handed on to the local sections of the Guépéou."

In private publications, paid advertisements are not authorized. On every printed work the authorization of the censorship must be mentioned. All printing works are submitted to a searching government control, and the authorization to found printing works can be refused without motive. Every printing house is required to keep a special register for orders.[1]

The principle of preliminary control by the censorship is bound up with the interdiction of the private press. The daily paper is an exclusive government monopoly. All other publications are subjected to a preliminary examination by the censorship, the communist press alone being excepted. There is also a censorship and a system of authorization for theatrical performances, cinemas, concerts, etc.

Legal Position of Associations.—As concerns the legal situation of associations, Sovietic law tolerates the creation of no political society. As the decree of October 16, 1922, shows, the simple fact of belonging to any other political party except the communist is punishable by administrative exile and hard labour.

Professional unions (syndicates) are State organisms. In the beginning, every worker was required to join them. The Code of Labour of 1922 has abandoned compulsory enrolment in the unions, but the Sovietic citizens are deprived as before of the right to found non-official syndicates. The Sovietic citizen is allowed not to be a member of a professional syndicate, but he is forbidden to create a new one.

The decrees of 1922 permitted the existence of certain associations, but there is no liberty of association in Sovietic Russia. To found an association, the authorization of the Home Bureau is necessary. Liberty of association in Sovietic Russia is refused in two ways, the professional syndicates are recognized as State monopolies and political unions are forbidden. As for the other associations, they have to request the authorization of government, and they are submitted to such a searching control, which goes so far as to interfere in the modes of election, that the term " association," in the sense given to it by European common law, can hardly be employed to designate legally the Sovietic associations.

The right of meeting has not yet been made the object of legislative regulation. In the projected administrative statute, mention was made of a preliminary authorization by the organs of the Home Bureau. In the Instruction of January 5, 1924 (ss. 43–4) it was stated that the meeting of the members of an authorized and duly registered society can he held only when the meeting has been previously "registered" by the local authorities.

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[1] Instruction of February 5, 1923.

In our summary statement [1] we have shown with the help of legislative texts what, in its main lines, is the legal situation of the individual in Sovietic common law. It would evidently not be strictly accurate to say that we have examined the so-called personal rights of Sovietic citizens, for the corresponding definitions of Sovietic law are very far removed from the elementary conception of personal rights. Security of person, equality before the law, no infringement of a man's liberty except by judicial sentence, penalties inflicted solely in accordance with the law and for acts qualified as criminal by the law, the liberty of meeting of association, of the press—all these "*Droits de l'homme et du citoyen*" are unknown in Sovietic Russia.

The legal doctrine of the Soviets does not accept the idea of any limitation whatever to the power of the State, for dictatorship cannot entertain the notion of a bounded authority. This is why "the themes which are treated in middle-class administrative law under the name of civic liberties" are examined in Sovietic common law merely "from the point of view of the defence of the revolutionary order of things." [2] That again is why the Sovietic doctrine resolutely refuses "specific guarantees of any individual rights whatever." [3]

Let us now examine, in the same brief way, the political rights and, in the first place, the electoral right. This is a right which plays a decisive part in every system of government. In the Sovietic State this electoral right is considered by the Sovietic doctrine itself as the basis of the whole Sovietic government.

Electoral Rights.—The right of vote is closely bound up with the general problem of representation. The Sovietic doctrine naturally rejects the idea of individual representation. To establish the form of representation defined by the Sovietic jurists as "collective representation based on production," [4] it is necessary for the Sovietic doctrine, as a preliminary step, to set aside the legal theory of representation, and first of all to reject universal suffrage in so far as it is a scientific notion and to consider it only as a purely political test established in the interests of the middle-class.[5] This part of the reasoning is the least interesting. It does nothing but repeat the commonplaces of popularized Marxism, which endeavours to reduce all the problems of constitutional law to one sole economic basis, uniformly tracing all democratic institutions to the selfish rapacity of the middle-class.

[1] For details see Mirkine-Guetzévitch, *Les Droits de l'Homme en Russie soviétique*, Paris, 1927.

[2] Elistratov, *op. cit.*, p. 10.

[3] *Op. cit.*, p. 7.

[4] Mikaïlov, *Représentation soviétique et Droit électoral. Pouvoir des Soviets.* 1922, No. 4.

[5] Brodovitch, *Le Droit électoral soviétique*. State Edition. Leningrad, 1925, p. 18.

The Sovietic writer quoted above affirms that his system of expounding the matter has one great advantage; by rejecting "every judgment of the electoral system based on the affirmation of the fact that this system approaches more or less closely the democratic ideal," and "adopting the method of the objective enumeration of the constructive elements," the author claims to be able to elaborate a process that can serve for the analysis at the same time of "the middle-class electoral systems, the mediæval ones, and even that of the Soviets." [1]

The Sovietic electoral law is based on qualification, the idea of "qualification" being defined in two ways: social (labour) and political.

These two qualifications are the basis, not only of electoral law, but also of the entire common law of Sovietic Russia.

As to the definition of class qualification, it has in Sovietic law a vague character that lends itself to quibbling. The constitutions do no more than point out a common social characteristic, and exterior distinction, that of the class of qualification, while the details are fixed by diverse and discordant local "Instructions." There exists no simple type of social, that is labour, qualification. Different instructions sometimes widen, sometimes narrow the idea of class in electoral law. Thus Art. 12 of the "Regulation of Elections in the Municipal Soviets of the R.S.S.U." (République Socialiste Soviétique d'Ukraine) is to the effect that individuals forming part of syndicates, "even if they conform with the requirements of labour qualification," are "neither electors nor eligible." So, in the case of the population of the towns in the Ukraine, the labour qualification is supplemented by the obligation to be a member of a syndicate.

An arbitrary expansion of the labour qualification is to be found in a whole series of electoral Instructions, and this expansion often takes on, not only a social and class character, but also a political one. For example, the Electoral Instruction of the Revolutionary Committee of the Far-East (August 8, 1924) not only deprives of their electoral rights all persons not belonging to the class of manual workers, but goes on to declare that peasants who have temporarily engaged in commerce cannot be allowed to take part in elections except by their special request, and then only if they succeed in proving that their commerce was temporary and casual, that they entered upon it at the epoch of the new economic policy, and that they were forced to it by some material reason or by family embarrassments, etc. Although the question of the labour qualification is regulated by the Instruction (January 16, 1925) of the Presiding Board of the Central Executive Committee of the U.R.S.S., the existence of different local instructions complicates this question even in the eyes of the Sovietic commentators.

In addition to the labour qualification, Sovietic electoral law recognizes further the political qualification. The different categories of persons deprived of electoral rights are priests, ex-employees of the Tsarist police,

[1] *Op. cit.*, pp. 24–35.

etc. The Constitution of the R.S.F.S.R. (Art. 14), like all the other Sovietic constitutions, also refuses all political and civic rights to persons hostile to the social revolution.

The most complete, though negative, definition of the political qualification is to be found in the Electoral Instruction of the R.S.F.S.R., dated August 11, 1924. Art. 17 of this Instruction enumerates the holders of offices under the Tsarist government (governors, ministers, chiefs of the nobility, public prosecutors) as disqualified to vote. A note appended to Art. 17 points out that the other officials are admitted to vote, when their loyalty towards the Sovietic power has been proved by their subsequent course of action. Very suggestive is the fact that Art. 14 of the Constitution of the R.S.F.S.R. deprives of electoral rights all persons in general hostile to the Sovietic rule, while the Instruction of 1924 disqualifies persons who have been unable to prove their loyalty towards the Soviets. The Sovietic commentator concludes: "The negative position is condemned and in its place proof of an active support is demanded."

But, like the labour qualification, the political qualification is regulated by local instructions as well as by those of the supreme central organs. The former greatly outstrip the latter as far as the piling up of negative conditions goes. Thus the Instruction of the local executive Committee of Northern Caucasus deprives of electoral rights, not only persons hostile to the Sovietic rule, but also those whose relations formed part of the White Army or emigrated. However, the kinsfolk of emigrants can all the same enjoy electoral rights "by proving their attachment to the Sovietic power and joining the workers or the labourers." Another instruction (of Ijev) exacts from ex-partisans of the White Movement, even if they were compelled to serve in the army only by reason of their mobilization, "a special proof of their devotion to the cause of the masses." [1]

District and provincial assemblies are assured representation on the different administrative and communist organs, on the Departmental Executive Committee, and on diverse administrative organizations, including the political police, the Guépéou. One may then say that, side by side with the government institutions, the officials have their separate representation. Thus it comes to pass that election is combined with official nomination.

It is to be remarked that the representation of the official nominees has precedence over the representation of those who are elected by reason of their influence, importance and situation.

And as the indication of the number of nominees depends on the local administration and the committees of local parties, the very system of representation is undermined.

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[1] In the matter of the families of emigrants, compare the French Revolutionary Legislation. Loi du 3 Brumaire de l'an IV, du 19 Fructidor de l'an V, du 9 Frimaire de l'an VI, etc.

Sovietic common law takes no account of the electoral system. These are the words of a Sovietic theorist. "If, in the republic of workers, we find the electoral system applied to a whole series of cases in which it is a question of nominations to certain functions, this takes place only because eligibility yields the precedence to nomination which one must approach free of all prejudice."[1]

This is why a critic of Sovietic common law comes to this conclusion: "As far as concerns admission to posts in the Republic of the Soviets, the system of nomination has, as a general rule, replaced that of election. The conception of the electoral means, as a convenient process, has curiously influenced the whole electoral system, assimilating it considerably to the system of nomination."[2]

Is the Sovietic system in reality a representative one? Are the Soviets representative organs?

The nominees are, of course, members of the communist party. Official statistics give a proportion of 6·1 per cent. in the rural Soviets. Each succeeding stage shows a higher average, though apparently the proportion of classes ought to remain the same, given the system of election on class qualifications. But at the highest stage, that of the All-Russian Congress of the Soviets, the number of communists rises to 94·1 per cent.[3]

Absenteeism at Sovietic elections passes all previous limits. In certain places only 9·7 per cent. of the women voters use their suffrage. If, going on Sovietic statistics, we add that the soldiers of the Red Army present themselves at the elections in the proportion of 78 per cent. of all the electors who come forward, we shall easily understand the specific character of the electoral body of the Sovietic State.

The fact of substituting nomination for election is closely connected with the very character of the communist party from the point of view of common law. The Sovietic doctrine affirms that "all attempts to interpret the Sovietic electoral system by recourse to constructions and procedures founded on middle-class institutions in common law must be uncompromisingly set aside. . . . The special characteristics of the Sovietic rule and electoral system make this inevitable, as also the fact that the elections in the conditions of the U.R.S.S. are effectuated on the basis of a single-party system."[4]

The single-party Sovietic system is a formula of dictatorship, conceived as the supremacy of a group independently of legal principle. The communist party is identified with the Sovietic State.

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[1] Reissner, *L'Etat, la Bourgeoisie et la R.S.F.S.R.*, Moscow, 1923, p. 343.

[2] Prof. N. Alexéiev, *Recueil de Droit de la Russie soviétique.* Prague, I, 1925, p. 112.

[3] In the village Soviets, 6·3 per cent.; in the assemblies of communal Soviets, 11·7 per cent.; in the district Soviets, 54·4 per cent.; in the municipal Soviets, 69·6 per cent.; in the assemblies of provincial Soviets, 78·8 per cent.; in the All-Russian assemblies, 94·1 per cent.

[4] Brodovitch, *op. cit.*, pp. 127–8.

The Sovietic doctrine of electoral law insists on the bond between the electoral system and the dictatorship of the party ; and openly and in precise fashion it legally identifies the Sovietic State and the communist party. " The deputies, being members of the communist party, are naturally bound by the orders emanating from the party centres, and are required to render account of their actions to the corresponding party organizations." [1]

It results from the presence of nominated members that the whole Sovietic representative system means the representation of the communist party alone. The State is the party. The Sovietic system is the sum of all the members of the communist party nominated or elected. The deputies are members of the communist party. So Sovietic representation is nothing but the distribution of members of the communist party among separate localities.

As we have seen, the Sovietic system finds no place in the classical theory of the sovereignty of the people. Even the elections by which the people indicates its will, are stripped of their legal significance. The elections, taken in conjunction with the nominations, are only an accessory and very imperfect procedure, of secondary importance. That is why we shall not speak of the electoral machinery, of the drawing up of the electoral lists, etc., for the Sovietic system has no interest for us here. It is indeed extremely primitive and fairly confused. There is not, for instance, a single electoral date, used in electoral campaigns.

Another point : the question of public or secret voting. The electoral Instruction of the R.S.F.S.R. of 1922 is to the effect that " the order of the vote, as also the question of public and secret ballot are determined by the electoral commission of the government." Art. 52 of the Ukrainian Instruction of 1924 states in more precise terms : " The elections are made by public ballot." Art. 44 of the Georgian Instruction runs : " The vote is given by simply raising the hand," etc.

The Sovietic electoral right is not based on equality. On the contrary, its basis is inequality. A part of the population are permanently or temporarily deprived of the suffrage for one reason or another. Even the citizens who have the right to vote do not exercise it in the same manner. Certain groups of the population have defined privileges. Thus the masses are privileged above the peasant class inasmuch as the constituencies of a town and a rural deputy are unequal in number. On the delegation of the municipal Soviets to the All-Russian Congress, one deputy was assigned to 25,000 inhabitants, while this proportion was considerably modified for the peasants and employees, who were accorded one deputy for 125,000 inhabitants. That is to say, a deputy of a municipal Soviet is elected by five times fewer inhabitants than a rural deputy.

The legislations of different constituents of the U.R.S.S. stress this inequality still further. For instance, the R.S.S.R. (République Soviétique Socialiste de la Russie Blanche) assigns a delegate to 50 electors of the municipal Soviets and one delegate to 500 electors of the peasant class; the proportion being no longer 5 rural electors for one municipal, but 10 for one. Art. 9 of the Constitution of the U.R.S.S. prescribes one deputy for 25,000 electors in the municipal Soviets and one for 125,000 peasants. The inequality of the representation gives interesting statistics as to the proportion of the different deputies to the Congress of the Soviets of the R.S.F.S.R. The peasants form the overwhelming majority of the Russian population, but on the supreme organs of the R.S.F.S.R. they constituted, in 1921, only 29·5 per cent.; in 1922, 27·1 per cent.; and finally, at the second Congress of the Soviets of the U.R.S.S. they were no more than 22·6 per cent.!

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[1] Brodovitch, *op. cit.*, p. 102.

We are led involuntarily to draw a parallel between this legislation and the electoral system in force in Russia before the revolution, at the time of the elections to the *Douma d'Empire*. The famous ordinance of June 3, 1907, had been issued by the Tsarist government with the intention of infringing on the constitution and with the express aim of modifying the electoral law, in the sense that centres of opposition were to be suppressed. This ordinance completely transformed popular representation in Russia, and was reviled by the jurists of Western Europe as an openly unconstitutional act. It had the consequence that Russia, though radically a country of peasants, counted in the *Douma d'Empire* only 22·4 per cent. peasants. In the same way, under the Soviet electoral law, the almost identical percentage (22·6 per cent.) of rural deputies is arrived at as after the ordinance of June 3, 1907, in the *Douma d'Empire*, a reactionary and mock-constitutional body.

In the towns there are two types of electoral colleges: on the one hand, you have the persons enrolled in the syndicates; on the other, the section of the population described as "non-organized," that is to say, those persons who, though they are "workers," do not figure on any syndicates. Where this fact does not entail deprivation of electoral rights, these persons vote separately, but a special proportion of representation is allotted them. At the elections of the Soviets of Penza, for instance, the proportion was one deputy for 1,000 persons of the non-organized element, and one deputy for 100 persons on syndicates and enterprises. Again, in the government of Nijni-Novgorod, there was one deputy for 200 workmen enrolled in the syndicates, one for 50 military units, and one for 200 of the rest of the citizens. . . . Further, in the Tersky district, there was one deputy for 50 of the organized class, one deputy for 200 of the non-organized. We will point out that the legislative body of Sovietic Ukraine alone has endeavoured, by a uniform law, to stabilize these unequal proportions of representation at the elections to the municipal Soviets. In the other legislations, the settlement of this unequal proportion is left to the good pleasure of the local authorities; it is doubled, tripled, quadrupled. In certain countries of Russia this privilege of representation has a strongly marked character.

The Moscow Electoral Instruction, for instance, besides the habitual representation of enterprise and syndicates in the proportion of one deputy for 200 electors, institutes the representation of the syndicates on the Soviet, in the proportion of one deputy for 5,000 members, and the representation of the syndicates on the departmental sections, with two deputies on a section. In other words, the inequality of the Sovietic electoral law consists, not only in the fact that the different classes of electors are submitted to different electoral regulations, but in the further fact that a second inequality is added to the first, for the privileged class of the Sovietic population votes twice, three or even four times in different rôles : now as members of syndicates, now as members of a departmental organization and so on.

But all these privileges are extended of course only to workers of whom the Government is sure. If the " privileged " section of the population happens to vote against the communist candidate, the Government has a means of dealing with the case as efficient as that of nomination.

For Sovietic law recognizes, though in a much simplified form, the principle of the revocation of deputies (Art. 75 of the Constitution of the R.S.F.S.R. and others). If, however, " revocation " is established as a principle of Sovietic common law, the method of its application is not yet organized. This revocation will doubtlessly remind us of the " Recall," which is practised in certain American States : though the American system, while rendering it possible to bar a citizen from re-election, does not entertain the idea of his direct revocation. If the Sovietic recall, on the contrary, makes this result attainable, it is improbable that it can have any real importance, in view of the supremacy of nomination over election.

The Sovietic elections aim in no way at assuring the representation of the Russian people or nation or even of the electoral body in its diverse opinions. By weighing considerations, not of legality, but exclusively of what is opportune, they are a procedure (combined with, and often playing a secondary part to, nomination) to arrive at the constitution of an organ of power formed of members of the communist party alone.

General Structure of the Soviet State.—We now have in hand a certain number of facts that will help us to understand the general structure of the Sovietic State.

The Sovietic jurists frankly avow the despotic character of their government. Still more emphatic are the admissions of Lenin himself. The law, according to him, " is nothing without the technical mechanism adapted to forcing the observance of the principles of this law." [1] " The government by the masses is a machine to crush the middle-class." [2] And treating of equality, Lenin said simply, " Only idiots or traitors can demand formal equality of rights for the middle-class." [3]

We are forced to admit that the Sovietic governments deny individual liberties to the middle-class, and are trying to establish a special form of State, based on inequality between privileged citizens and those deprived of their rights, "workers" and "non-workers." Let us abstain from judging from a moral or political point of view this effort to construct a State of masters and slaves. Let us pass over this fundamental vice of the Sovietic inequality. Examining the situation of the press, of the associations, and especially of personal security, we have seen that the Sovietic citizen, even when privileged, is literally crushed by the power. Between governors and governed there is no legal rule that limits the power of the governors, be it in favour of the governed or in the name of a legal or extra-legal principle.

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[1] Lenin, *Œuvres complètes*, t. XIV, 2, p. 377.

[2] *Ibid.*, t. XVI, p. 7.

[3] *Ibid.*, t. XV, p. 373.

In absolute monarchies there is often no limitation of power. But the Sovietic State denies the principle of any limitation whatever of the power of the State.

Sovietic absolutism, as we have just seen, represents, not only a material fact, but an attempt to justify theoretically the unlimited power of the State. We have under our eyes, not only the negation of democracy, the suppression of all liberty, but also legal and State dogmas based on anti-democratic principles.

Setting aside all political judgment, from the sole point of view of legal science, it is impossible to refrain from definitely condemning Sovietic absolutism.

Legal science unveils the insane despotism of a power based on anti-democratic principles, and this fact in itself entails, as a political deduction, the affirmation of the moral and scientific value of democracy as a legitimate institution.

DISABILITIES OF WOMEN UNDER JEWISH LAW—CAN THEY BE REMEDIED?

[*Contributed by* MR. JUSTICE FRUMKIN, *Supreme Court of Palestine.*]

THE disadvantages of the legal position of women under Jewish law have always occupied the minds of communal and Rabbinical authorities in Jewry. Since the recent world-war the disabilities of women have been the subject-matter of discussion and controversy, as usual not without exaggeration.

I will begin by enumerating such disabilities and disadvantages with the sole object of having them before us in considering the possibility of removing some of them or introducing some ameliorations, thinking always of improvements and ameliorations in accordance with Jewish law and within the borders of Jewish tradition.

The discrimination of the Jewish woman as a wife, as against the husband, begins already at marriage, continues during matrimonial relations, and does not end at the dissolution of marriage by divorce or death of the husband. The Jewish woman as a daughter is also discriminated against *vis-à-vis* of her brothers.

Disadvantages and Disabilities of the Jewish Wife. Kiddushin.—The principal part of the marriage contract under Jewish law is the so-called *Kiddushin*, meaning " Sanctification." The prevailing practice at present consists of the bridegroom putting a ring upon the finger of the bride, saying, " Thou art sanctified unto me by this ring according to the Law of Moses and of Israel." The ring is not a necessary element of the procedure, sanctification may be effected also by means of handing a silver coin to the bride, one of the principal conditions being, however, that the ring or coin must be the property of the bridegroom. There are other methods of sanctification, by deed and consummation of marriage, with which we are not concerned at present. Consent of both parties is, of course, essential, but, whereas as regards the husband, there could hardly be a case in which consent is questionable, there are many cases of sanctification which occur without the consent of the girl or where her consent is a matter of grave doubt. It is the husband who performs the active part at the celebration of the sanctification, and having performed the act of delivery of the ring or coin, and having pronounced the requisite phrase, he could hardly plead that sanctification was done without his consent, his only allegation could be that of having done it upon threats of violence. That is not the case with regard to the wife, whose share in the ceremony is a passive one. Sanctification in the presence of only two witnesses has in many places been, and is in many more places, still considered binding. As a result of the *Kiddushin*, the betrothed girl becomes legally the wife of the man, and can not marry anyone else unless and until she has obtained a proper divorce.

The hardship to a girl who becomes the victim of such a transaction is not difficult to understand. A person who has taken the improper step of sanctifying a girl as his wife without her consent, for whatever reason and under whatever circumstances, is not likely to give her her freedom easily. We shall have an opportunity later of considering the difficulty of a wife in obtaining a divorce from an unwilling husband, but even if the divorce is obtained by satisfying the grasping demands of the husband, the girl has not obtained a full restitution, as by law she would be regarded as a divorced woman, unable, for instance, to become married to a Cohen.

Agunah.—During matrimonial relations, the Jewish wife might find herself in that unfortunate position of an *Agunah*. This means her being deserted by the husband, or the husband disappearing without there being any knowledge as to his whereabouts, or his life or death, with the result that the woman may all her life be prevented from re-marriage.

Of course, I do not consider that a discrimination against the wife, because an equal position might arise in the case of the husband being deserted by his wife. As the majority of Jews are now monogamous, the husband may, in such a case, be in an equal difficulty with regard to re-marriage. Theoretically that may be so, but in fact it is the woman who is more frequently exposed to that hardship.

Insanity.—As will be explained later, divorce requires the consent of the two parties, and, of course, there can be no consent when one of the parties is in a state of legal incapacity, such as insanity. But whereas in the case of the insanity of the wife there is an established procedure of obtaining permission to re-marry, there is no remedy for a wife whose husband becomes insane.

Divorce.—Theoretically the woman is in a disadvantageous position as regards divorce under Jewish law, inasmuch as it is only the husband who can divorce his wife, and there is no such thing as divorce by the wife. That being the origin of divorce in Mosaic law, it has been so developed that practically there can be no divorce without the consent of the two parties. But in certain cases the husband may successfully apply to the Rabbinical Court for an order to compel the wife to accept a divorce without her consent, such as in a case of adultery or unobservance of Ritual law, but to the credit of Jewish law it must at once be said that for almost the same reasons the wife can apply and succeed in obtaining an order compelling the husband to give a divorce. But here comes the discrimination. Whereas it is possible to force the deed of divorce upon the woman without her consent, in accordance with an order of the Rabbinical Court that the husband is entitled to have her divorced, there are nowadays no means to compel a husband to obey an order directing him to give a Deed of Divorce. As in *Kiddushin*, in the divorce proceedings also, the share of the woman is a passive one, and it is again the husband who has to fulfil certain formalities.

Chalitsa.—With the death of the husband without offspring the Jewish woman might be subjected to the degrading procedure of *Chalitsa*. The original of this institution known as the Levirate marriage as provided for in the original Law of Moses is ideal. The girl leaves the house of her parents, marries a young man, and goes to live in his family, under new circumstances. After a short time the husband dies. A double duty is then imposed upon the surviving brother of the deceased, that of standing by the young widow, keeping her in her new surroundings, and as regards his deceased brother, that of ensuring the continuance of his name. For these two reasons the duty of marrying the widow was imposed upon the surviving brother. It was only in the case of refusal on his part to fulfil such a duty that he was compelled to give *Chalitsa*.

Already in the Mishnah the original purpose was given up, and *Chalitsa* was no more optional as substitution for marriage, but compulsory. The unfortunate widow has, therefore, to persuade her brother-in-law to do his duty of *Chalitsa* before she can be re-married, as there are no ways of compelling him against his will.

Guardianship of Children.—Another hardship of the wife or rather of the widow, after the death of her husband, is that she can never be appointed guardian of her own children, and the control of them is entrusted by the Beth Din to a man—necessarily a man—who might not be as good to the children as the mother would like.

Inheritance.—During matrimonial life the wife has full control over her property without any interference by the husband, the husband being, however, entitled to the profits of her work and to the income of her property. In the case of death, however, there is a substantial difference between the respective rights of husband and wife. While the surviving husband inherits his wife's property, the surviving wife is not considered a legal heir. True, there is a substitution for that right of inheritance in the form of alimony, or an amount fixed in the Contract of Marriage known as *Ketubbah*. But neither alternative is always satisfactory. It is not always that a widow would like to depend upon the mercy of even her own children, not to mention the case where there are step-children. The *Ketubbah* is not always satisfactory, for the simple reason that the amount fixed in the Contract of Marriage, although it might have been considered an adequate and appropriate sum at that time, may be far from proportionate at the time of death. Take the case of a marriage contracted, say, in 1900, the bride having obtained an original *Ketubbah* of £200, and an additional *Ketubbah* of £2,000, if she has given her husband a dowry of £1,000. The husband dies in 1930, leaving a property of £100,000, obtained during the thirty years of matrimonial life, in which the wife has taken not a small share in building up the capital. If the wife does not agree to stay on in the house as the guest of her children, all she would be entitled to would be the inadequate sum of £2,200.

Disabilities of the Jewish Daughter.—Fortunately there is no long list to enumerate in this case, the only discrimination against the daughter as such being her incapacity to inherit the estate of her father at the given existence of brothers. A substitution has been thought of and provided for also in this case. It is the duty of the brothers to look after their sister and maintain her until she is married, and also to provide for her marriage in a way which her father would be expected to have done if he were alive.

These are the cases in which, under Jewish law, the woman is subject to discriminations as against the man. It must, however, be mentioned that the disadvantageous legal position of the Jewish woman is not in conformity with her advantageous position in actual life. The disabilities are certainly not due to disrespect or disregard of the woman, who has all through Jewish history always enjoyed a most respected position in family life. Already, in the primitive times of Abraham, when Eleazer went to look for a bride for the son of his master, Bethuel had first to obtain the consent of the young child, as Rebecca was then, before he could agree to give her in marriage.

In the Ten Commandments the mother is put on equal terms with the father, as regards respect due to her by her children. It would not be difficult, in tracing the sources of the disabilities, to find that what is now considered as disability had full justification in the social conditions of the ancient periods in which they were created. I will give only one example, taking the disability last mentioned.

The reason for the Jewish daughter having been deprived of sharing the estate of her father with her brothers is the wish to have every Tribe in Israel keeping the land allotted to it for ever, without its being subject to transference to anybody outside the Tribe. That could only be secured by the land passing to sons alone and not to daughters, who were likely to marry members of other Tribes, and so cause the land of their fathers to pass to her children, who would be strangers to her Tribe.

When Zelophehad died without male offspring, his five daughters obtained the consent of Moses to inherit the estate of their father under the condition that they should only be married to the sons of their own Tribe.

But whatever were the reasons of their disability, it is a hardship upon a woman to be subject to a sanctification without her consent, and not to be on equal terms with men as regards divorce and inheritance.

Should and Could such Disabilities be Remedied?—The first part of the question may appear strange, but I am putting it because in certain circles, including those of English Jewry, to search for a solution of difficulties of an economic character under Jewish law might be considered superfluous. The Beth Din in England and in other Western countries has no longer any jurisdiction in matters of inheritance or appointment of guardians, all cases of this sort being settled before the civil courts, in accordance with the law of the country. There are, however, many communities in which the Rabbinical Courts still deal with matters of this nature, and there are millions of Jews who would like to be guided in all matters of family life in accordance with Jewish law. I do not hesitate to say that if the answer to the second part of the question could be in the affirmative, all disabilities, including such as are only of an economic character, should be remedied. There can certainly be no other view but that such disabilities as are detrimental to the basis of Jewish family life should, if only it were humanly possible, be remedied.

The greatest difficulty would be to answer the second part of the question, " Can such disabilities be remedied ? "

At this stage I must say that I am not a scholar in Jewish law, and can speak with no authority. I am dealing with the matter as a layman, anxious to see the ancient law progressing to meet the progress of life. The Law of Moses is a law of life, and as such must develop and improve to meet the conditions of life.

From the little I know of Jewish law I can only say this: that it would be a very difficult task to approach that scheme, but it should not be impossible. Improvements and alterations have been attempted and obtained in different times of history; there is no reason why it should not be tried again.

I shall not take upon myself the difficult task of bringing suggestions as to future improvements, but I shall cite a few instances in which improvements of greater or minor importance have been made.

Instances in which Improvements have been Made.—The Takanoth, or rules of Rabenu Tam and the Takanoth, known under the initials S.W.M., being the first letters of the three large Jewish communities of Spier, Worms and Mainz, are well known. The rules made in the twelfth century at the Rabbinical Assembly in France, presided over by Rabenu Tam, included three rules relating to Family Law, namely:

1. That in case of the wife dying during the first year of marriage without offspring the husband shall return all the dowry and jewellery to those who provided them or to the heirs of the deceased, after deduction of the burial expenses.

2. That the husband could never claim the dowry due to him, even if the wife died after the first year of marriage.

3. That no disparaging words shall be used with regard to a Deed of Divorce after its issue.

At the Assembly of the Rabbis and the Heads of the Communities in Mainz in the year 1220, in which the Takanoth S.W.M. were adopted, it was decided, *inter alia*, that the brother marrying his deceased brother's wife, or giving her *Chalitsa*, must do that without remuneration.

At the permanent Synod held at Lublin in 1650, amendments relating to the re-marriage of an *Agunah* were considered.

A most important improvement in the law of *Kiddushin* has been introduced only recently in a comparatively small country, to which I shall take the liberty to refer at some length owing both to the importance of the improvement and to the fact that it may serve as an illustration to prove that with some courage, energy and understanding grave disabilities can be removed even nowadays.

I shall best approach this subject by describing a case which recently happened in Jerusalem.

Hefzibah Baz, the daughter of a poor Jew of Moroccan origin, became engaged to Ibrahim Mizrachi, a Khurdistan Jew, a carpenter by profession. The girl, who was only fourteen years old, well educated and of charming appearance, was persuaded by her parents to consent to that engagement, the parents thinking that it would be to the good of the child to be provided for in that way rather than to starve at their house, where there were many more children to support. The parents soon realized, however, that they were wrong to influence the child, as the marriage would not be a successful one. Ibrahim wanting to present both the girl and her parents with a *fait accompli* invited the girl one evening to the Pictures, accompanied by two friends. On the way the girl felt something put into her hand and some words spoken, the meaning of which she did not understand. It did not take long for the family to find out that the girl had been sanctified as the wife of Ibrahim according to the Law of Moses and of Israel, the bridegroom declaring that he would only agree to divorce Hefzibah at a price which was beyond the possible resources of the family. An action was brought before the Rabbinical Court in Jerusalem, in which the two friends of Ibrahim gave evidence that the sanctification was done by the consent of Hefzibah, who was afraid her parents might prevent the marriage. In going into the matter, which came to my notice afterwards, I found out that only some thirty years ago in Egypt a rule, or, as they called it, a *Haskama* (agreement), was passed to the effect that no sanctification is to be deemed valid and binding unless each of the following conditions has been fulfilled, namely, (*a*) that the sanctification be done by permission of the Rabbi presiding over the Rabbinical Court of the town, and in villages where there are no Rabbis, the sanctification has to be made by permission of the Gabbai elected by the community, (*b*) that the sanctification be always celebrated before a Minyan of ten, including the Beth Din clerk, or another on behalf of the Rabbi, in the villages it must include someone appearing on behalf of the Gabbai, and (*c*) the sanctification always be accompanied by a deed in writing.

The *Haskama* went further to proclaim that any sanctification not made in full accordance with these conditions should be considered null and void *ab initio*, and the woman free to marry anyone she likes.

This *Haskama* was passed in the month of Liwan of the year 5661,[1] by the late Chief Rabbi Eleahu Hazan of Alexandria, the late Chief Rabbi Raphael ben Shimon of Cairo, and the late Rabbi Mandel Hacohen, Rabbi of the Eshkmazim law of Cairo.

I called the attention of the Chief Rabbis of Palestine to that case, asking them why it should not be possible to have an equal *Haskama* made in Palestine to avoid at least future happenings like the one in issue. As to this special case the girl's parents were advised to lodge an appeal before the Rabbinical Court of Appeal of Palestine, and one of my old students—a young barrister versed in Jewish law—acted as counsel for the girl. Lately I was informed that the Rabbinical Court of Appeal, sitting in Plenum, including all the Dayanim, Ashkenasim and Sephardim, presided over by the Chief Rabbi Tescot Meir, quashed the judgment of the Rabbinical Court of first instance, and in conformity with the *Haskama* cited above, held that the sanctification was null and void *ab initio*. During the proceedings it was discovered that the Egyptian *Haskama* was based on a previous *Haskama* of the same nature adopted in Jerusalem in olden times.

The Egyptian Haskama.—While dealing with this *Haskama* it will be of interest to indicate the method in which it was adopted and promulgated.

At an Assembly consisting of the leading members of the communities and of the Rabbis of Cairo and Alexandria, held at Cairo in the week of Passeh 5661, at the premises of the Beth Din, the decision was adopted, at the reading of the Thora, with the provision that it should not come into force until it had been proclaimed on four successive Sabbath days in the Synagogues of Cairo and Alexandria. After this was done the Chief Rabbis Chazan and Ben Shimon took upon themselves the trouble to visit almost all the Jewish communities of Egypt, other than those at Cairo and Alexandria. Assemblies were held at each community, the decision read out to them and a formal consent accepted. It then became law, binding upon all the Rabbinical Courts of Egypt.

It will also be of interest to mention the technical reasoning used to make such a decision possible. As I said in the beginning, the ring or coin used by the bridegroom for the sanctification must be his own property. Beth Din has the right in certain cases to disappropriate properties and declare certain property as *Hefker*. In this *Haskama* they decided that any metals used for a sanctification, which was not in conformity with the rules, would be disappropriated, hence the bridegroom had sanctified with an article which was not his own property.

In Egypt after this *Haskama*, and in Palestine after the last decision of the Rabbinical Court of Appeal, *Kidushin* without the consent of the girl becomes a matter of impossibility. Here is the removal of one of the most important hardships.

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[1] Equivalent to May 1901.

Inheritance.—In Palestine the matter of inheritance by the wife and daughter has also found its solution, which is perhaps not quite satisfactory from the point of view of strict Jewish law. Under Turkish regime, matters of inheritance of Jews were within the jurisdiction of the Moslem religious courts. That was found an unsatisfactory state of affairs under the present Administration, and in 1920 a Commission of Inquiry was constituted to go into the matter of the jurisdiction of the religious courts with a view to recommending alterations. It was common ground that the Moslem courts should no longer continue to have jurisdiction in matters of personal status regarding non-Moslems. The Moslem courts shared the same view. The question was, " What court should be vested with that jurisdiction ? " The demand was made that it should be transferred to the religious courts of the respective communities, but here a difficulty arose with regard to the Jewish religious courts. If they were to apply Jewish law, the woman, both a wife and daughter, would be prejudiced. The Rabbinate then agreed that on the principle that the law of the country is law, they would apply the law of the country as regards inheritance if so desired by any party, and it was under that understanding that the Rabbinical Courts obtained jurisdiction in matters of inheritance of Jews. Before obtaining that jurisdiction the Rabbinical Courts had also to introduce certain improvements in matters of procedure, including a system of trial by default and the establishment of a Court of Appeal.

In practice the question of inheritance of the wife in Palestine had found its solution long ago, as it is now common practice among Jews that all immoveable properties are registered in the names of both husband and wife in equal, undivided shares, so that at the death of her husband the wife will find herself always the legal owner of half the property, no matter what would be the law of inheritance applied. This practice was adopted some forty years ago by the pioneer settlers of Rechovoth and Rishon-le-Zion, and is continued up to now all over Palestine.

The most important and most difficult disabilities are, and still remain, the ties of the *Agunah*, and the difficulty of compelling the husband to give a divorce to his wife when in accordance with Jewish law he should do so. This question has recently been raised in the English-Jewish community, and it was also a matter of discussion in Germany some five or six years ago.

A Universal Assembly.—It seems that these disabilities could only be remedied by the issue of Takanoth by authoritative Grand Assemblies of Rabbis like those made by the Assembly of the Rabbis of France, presided over by Rabbenu Tam or the Takanoth of the " Committee of the Four Countries." It is generally thought that such an Assembly must be of universal character, composed of Rabbis of all the Diaspora.

From the examples cited it appears, however, that this is not the case. Most of the Takanoth have been issued by the Rabbis of certain countries, or groups of countries, binding, of course, on their respective communities only.

An universal Assembly would be preferable, but if impossible, the Rabbis of a certain country, or of several countries united for the purpose, could make Takanoth for their own communities.

Since the beginning of this century certain attempts have been made towards the convening of such an Assembly. In 1901 Rabbi Mendel Hacohen, of Cairo, one of the signatories to the Egyptian *Haskama* cited before, published a pamphlet addressed to the Rabbis of the world, urging upon them to meet for the purpose of considering matters of vital importance to Judaism.

In 1907 Rabbi Lurie issued an appeal to all the Rabbis of Russia, asking them to unite for the creation of a Sanhedrin which should be a sort of spiritual centre for Jewry. Five hundred Rabbis and communal leaders, it is said, agreed to join a society to be established for that purpose.

Rabbi Doctor H. Peraeira Mendes, of New York, has also raised this question recently.

The difficulty is that certain orthodox Rabbis are opposed to the idea of having a body with legislative power of any sort, one of the reasons being that the right to legislate, which was given to Moses and by him to Joshua, was handed on until it reached the men of the Great Synagogue, and then it stopped with the destruction of the Temple.

Not at this stage, and not by a humble layman like myself, can this controversy be resolved or even argued, but I feel that the duty falls mainly upon orthodox Rabbinical and communal authorities to discover the means of supplying the remedies for hardships of the nature described, so that the honour and purity of Jewish family life which has played not a small part in carrying Israel through their 2,000 years of sufferings in the Diaspora may be preserved.

Perhaps the time has come for responsible Rabbis and influential communal leaders to form themselves into a Committee to consider the possibility of convening the long-needed Assembly.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Conference on Dominion Legislation.—The report of the Conference on Dominion Legislation [1] is perhaps a rather disappointing outcome for the labours of a body whose work extended from October 8 to December 4, 1929. The Imperial Conference of 1926 doubtless contemplated that the framing of the measures necessary to implement its declaration of the equality of the members of the Empire would require full deliberation and result in some carefully worked-out scheme. But in fact the net product of the report is almost entirely destructive, and such a result might easily have been reached by correspondence if it had been really what was contemplated by the Conference of 1926. As it is, the Conference contented itself with destroying the legal unity of the Empire without evolving anything to encourage co-operation. It marks clearly the driving force of the Prime Minister of the Union and the Government of the Irish Free State, and their determination to secure autonomy without at the same time committing their Dominions to co-operation in maintaining Imperial interests.

Disallowance and Reservation of Legislation.—The Conference recommended the simple disappearance of both these powers of the Crown in respect of Dominion legislation, such abolition to be effected by constitutional modification in the case of the Dominions possessing such power, and by the Imperial Parliament at the request of the Dominion concerned in other cases. In regard to disallowance it is, of course, true that the exercise of the power is really obsolete, but reservation is another question, and it must be remembered that the existence of the power to reserve has always served as a safeguard against any very strong assertion of principles known to be disapproved by the Imperial Government. Hence the decision to abolish both these safeguards is a matter of some importance, especially in its relation to the controversy over the right of secession. What, however, is most curious is that the Dominions accept as valid the maintenance of the right to disallow in respect of legislation which appears to the British Government to alter to the injury of the stockholder any of the provisions affecting colonial stocks admitted to the list of trustee securities in the United Kingdom, or to involve a departure from the original contract. It is easy to understand the reasons which have brought about this admission, for clearly, as money has been freely contributed by the United Kingdom investors on low terms on the faith of Imperial control, it would have been impossible for Dominion Governments to suggest repudiation of the obligation. But it may well be held that it would have been much more dignified and more useful to the stockholder to substitute for the theoretical power to disallow an agreement that any dispute which may arise on this issue shall be referred to the Privy Council or some other body for decision, the Dominion Government undertaking to give effect to any decision without delay. But as matters stand the admission is an interesting survival of the supremacy of the Imperial Government.

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[1] Parl. Paper, Cmd. 3479.

Extraterritorial Operation of Dominion Legislation.—On this subject the Conference has gone beyond the terms of reference to it by the Imperial Conference of 1926. That body merely suggested the consideration of the practicability and the most convenient method of giving effect to the principle that each Dominion Parliament should have power to give extraterritorial operation to its legislation in all cases where such operation is ancillary to provision for the peace, order and good government of the Dominion. The limitation is disregarded by the Conference, as also is the suggestion that the power should apply only to Dominion nationals, and it is merely proposed that it should be declared that the Parliament of a Dominion has full power to make laws having extraterritorial operation.[1] It is extremely difficult to understand what the effect of so vague an enactment would be. Does it mean that Canadians and other British subjects may be bound in respect of acts done in the United Kingdom by Canadian laws, so that a British subject born and resident in the United Kingdom may be subjected to criminal proceedings if he ever visits Canada in respect of some act done in the United Kingdom which may be deemed inimical to Canadian interests, *e.g.* depressing the price of Canadian wheat, or supplying incorrect invoices for production to the Canadian customs service ? The complications are obvious, when the relations of the Irish Free State and Northern Ireland are borne in mind. A bookseller in Northern Ireland may be subjected to penalties for selling to any citizen of the Free State literature whose importation into that territory is prohibited under the censorship imposed in the interests of morals. Or again the fishermen of Northern Ireland may be imprisoned for fishing in the open sea beyond territorial limits, but in waters over which the Free State chooses to exert authority. The fact that such legislation was possible was clearly before the minds of the Imperial Conference of 1926, and the unlimited form of the present recommendation suggests that friction of a grave character might well arise, as also in the case of taxation.[2] The recommendation should clearly have at least provided for consultation between the governments of the Empire, before extraterritorial legislation was passed in any territory, which might affect the interests of British subjects resident in other parts of the Empire. The relations of the several parts of the Empire cannot be adjusted merely by according every part unfettered authority, for it must be remembered that the United Kingdom has for decades made no use of its extraterritorial powers without Dominion assent.

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[1] For an interesting example see *Trenholm* v. *McCarthy*, [1930] 1 D.L.R. 674, under the Canadian customs legislation. See *Journal of Comparative Legislation*, Third Series, vol. xi, pt. iv, pp. 259, 260. I am indebted to Prof. W. P. M. Kennedy for calling attention to this decision.

[2] *Cf. Pass* v. *British Tobacco Co. (Australia)*, 42 T.L.R. 771 ; *Journal of Comparative Legislation*, Third Series, vol. ix, pt. i, pp. 125–6.

The Colonial Laws Validity Act.—It is definitely proposed that the supremacy of Imperial legislation should be abrogated and each Dominion should be free to repeal any Imperial legislation applicable to it. There is, however, one necessary exception enforced by the position of Canada and Australia. The Dominion Government had no mandate to arrange for the abrogation of the British North America Act, and, however strong may be the theoretic objection to the supremacy of Imperial legislation, the grant of power to the Dominion Parliament to alter the constitution would have been impossible even for so courageous a body as the Conference of 1929. No Canadian Minister could have ventured to return to the Dominion with a promise of such a change. Hence the grant of power will not extend to any alteration of the federal constitution, and the same principle of leaving matters *in statu quo* applies to all the constitutions of the Dominions. They will remain subject to alteration as at present; curiously enough the dubiety[1] which exists regarding the powers of the New Zealand Parliament to change its constitution will not even be removed, though to this there could be no real objection. The case of the Irish Free State is of special interest, for the Conference acknowledges its right to amend its constitution, but only within the limits of the treaty of 1921. This is of course a serious limitation on the power, because it negatives any possibility of secession by Free State legislation alone, for the treaty accords the Free State its powers solely as a member of the British Commonwealth of Nations, and places its authority on the footing of that of Canada. It even leaves it doubtful whether the Free State can legally abolish the appeal to the Privy Council, for that exists in Canada as an essential part of the constitution in each province as well as in the Dominion, which cannot at present be removed by Dominion legislation alone. Doubtless, however, if the Free State purports to abolish the appeal in due course, the abolition will not be questioned by the Privy Council. The Union of South Africa is left free to alter its constitution as at present, but it is clear that this authority must be exercised in accordance with the rules laid down in s. 152 of the South African Act, 1909, unless and until that section is itself altered in accordance with its terms. The Conference, therefore, has avoided the error of impinging on the vital issue of constitutional change, and the power to repeal Imperial legislation applicable to a Dominion is free from serious objection. It may safely be assumed that, where repeal is carried out in matters affecting international obligations, *e.g.* those covered by the Foreign Enlistment Act, suitable provisions will be provided in lieu by Dominion legislation.

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[1] Keith, *Responsible Government in the Dominions* (1927), i. 354, 355.

Imperial Legislation for the Dominions.—Fortunately also the Conference has refused to deny the power of the Imperial Parliament to legislate for the Dominions, a step which would have been a decidedly serious breach of Imperial unity. It has instead adopted the very reasonable view that such legislation should be formerly declared to be enacted at the request and consent of a Dominion in any case where it is decided to deal with a subject by Imperial legislation. No doubt such legislation will in future be increasingly rare, unless and until the advantages of combined action are more appreciated than at present. It is contemplated by the Report that normally in matters of Imperial concern at present governed by Imperial Acts there will be similar action by each Parliament. Such topics include the law of prize and co-ordination of prize jurisdiction, extradition, the rendition of fugitive offenders, and foreign enlistment, and the practically important issue of nationality, which, in fact, has already been dealt with largely in this manner. The privileges of any Imperial forces which may be stationed in a Dominion will similarly be given by local Acts. Much more interesting is the proposal that " any alteration in the law touching the succession to the throne or the royal style and titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom."

The Right of Secession.—This last provision, which was intended as a recognition of the equality of status of the Dominions with the United Kingdom, has had the unfortunate effect of eliciting a revival of the issue of the right of secession in the Union of South Africa. General Smuts naturally[1] pointed to this portion of the Report as showing that it would be impossible for the Union of South Africa Parliament to legislate to change the Royal House or establish a Republic without the assent of the legislatures of the other Dominions as well as of the United Kingdom. This inevitable interpretation elicited the strongest objections from General Hertzog, who clearly had not realized how gravely the Report thus ran counter to his belief that the Imperial Conference of 1926, by its declarations as to autonomy and equality, gave the Union the right to secede, and he was supported in his objection to General Smuts' view by his ministry, including Colonel Creswell who speaks for a section of the Labour Party of the Union. Eventually the Report was approved only on a majority vote of 68 to 56 in the Lower House, because it was insisted by the Government that acceptance " shall not be taken as derogating from the right of any member of the British Commonwealth of Nations to withdraw therefrom." It will be noted that the right of secession is assumed to exist, despite the fact that it contradicts the recommendation of the Report, and that it further contradicts the limited power of constitutional alteration admitted to the Irish Free State and to the Union by the Report. The Union Constitution makes no provision for the possibility of secession, and the Report in no wise extends the authority given to the Union Parliament to alter the constitution. The limitations on the Union Parliament in regard to secession flow not from repugnancy of such legislation to an Imperial Act, but from the fundamental principle that the Parliament was created to legislate for a portion of the British Empire and that, if it seeks to extinguish the membership of the Union in the Empire, it is going beyond its function. The attitude now adopted by the Parliament of the Union renders it difficult for the Imperial Conference to refuse to pronounce definitely on the issue of the right of secession. It is, of course, obvious that such a right cannot be accorded by any conclave of Prime Ministers, but must be admitted by the Parliament of the United Kingdom at least, if it is to have any validity, and it is not unimportant to note that the Union Government decided to obtain endorsement by the Union Senate of its claim of the right to secede. The argument for granting the right is, of course, that the grant would possibly remove the desire in the case of the Dutch population of the Union. The argument against the grant is that it would revive the efforts of the Dutch in the Union, as represented by a very large section of the population, and reasserted in July 1930, to secure absolute independence; that it would lead to great pressure to secede being put on the Government of the Irish Free State; and that, as India has been promised Dominion status, the right of secession must be admitted to India also.

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[1] Mr. McGilligan admitted the restriction on the Free State in the Irish Parliament, March 20, 1930.

Merchant Shipping Legislation.—For practical purposes great importance attaches to the recommendation that each Dominion should be freed from the restrictions on its power of legislation as to merchant shipping imposed by the Merchant Shipping Act, 1894, and that, in lieu of the present Imperial control of British registered shipping by paramount legislation, as recognized by the Dominion courts, such shipping should be subject to legislation by each Dominion. It is suggested, of course, that this right of control in each Dominion should be exercised subject to principles intended to secure uniformity, but it is clear that this suggestion falls in the region of pious aspirations, and that the Parliament of the Commonwealth, if given full power over British registered shipping, will be compelled, even if the Government should be reluctant to act, to deal with shipping questions from the point of view of Australian Trade Unionism. Moreover, similar rights belong, under this scheme, to the other Dominion Parliaments, and New Zealand, which is advanced in ideas on shipping matters, nonetheless is not in accord with Australia on certain issues. It certainly seems difficult to regard this result as either satisfactory or in accord with the doctrine of Dominion equality of status. The true principle seems rather to be that each part of the Empire should solely control its own registered shipping and its coasting trade, thus placing the Dominions and the United Kingdom on an equality, not that the Dominions should be free to control British registered shipping merely because it engages in trade with the Dominions. In practice, of course, the right of the Dominions to deal similarly with foreign shipping cannot be effectively exercised. The Dominions are eager for foreign markets, and retaliation by penalizing imports would rapidly compel cessation of any effort to apply Australian standards to foreign merchant vessels putting in at Dominion ports. The true doctrine in these cases is undoubtedly pointed to by international action to define standards of safety for sea-going vessels, *e.g.* the recent load-line convention. These standards should be provided for in respect of all ships by the United Kingdom and the Dominions alike, and nothing but confusion and prejudice to British shipping will result if the Dominions single out British shipping for differential treatment. The effective principles which should be observed were determined by the Colonial Merchant Shipping Conference of 1907, at which the Commonwealth had as representatives two strong supporters of autonomy in Sir W. Lyne and Mr. Hughes himself, and a revision of the Act of 1894 to give full effect to these principles would have served the occasion far more effectively than the present proposals. How unsatisfactory they are is indicated by the admission of the Report that it cannot recommend arrangements for mutual enforcement[1] of the law of each part of the Empire regarding offences committed on ships registered in that part. Chaotic conditions are envisaged as a result of the breaking up of the unitary system; ordinary crimes may perhaps be dealt with by working out a scheme for legislation in the several parts of the Empire whereby the system which at present operates under the Fugitive Offenders Act, 1881, may be continued; offences against merchant shipping legislation may be also offences against the local law in each part, and as regards offences against discipline legal proceedings can be taken when the vessel returns to the place of registry. The obvious difficulty regarding vessels which never return to the country of registry is not seriously faced. It is, in fact, clear that the whole of the complex questions as to shipping will have to be thought out systematically. India, of course, will have to enjoy Dominion privileges in this matter, and the prospect is not exactly an attractive one for British shipping.

Colonial Courts of Admiralty.—There is far less objection to the decision to recognize full powers in the Dominions to regulate their own Courts of Admiralty and their jurisdiction, even if the power does not already exist as suggested by the Privy Council.[2] It may be hoped that in this matter there will be uniformity of action when extensions of jurisdiction are made, based on international agreement, but so far the Dominions have been very slow to show any desire to co-operate with other nations in changes of maritime law, as is exhibited also in the fact that it has taken so long to secure uniformity in accepting the principles of the Carriage of Goods by Sea Act, 1924.

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[1] Keith, *Imperial Unity and the Dominions* (1916), p. 230.

[2] *Journal of Comparative Legislation*, Third Series, vol. xi, pt. ii, pp. 262, 263. Curiously enough Canadian lawyers have tended to deny the power of Canada to legislate, forgetting that a generous view of Dominion powers is always taken by the Privy Council. See *Edwards* v. *A.G. for Canada*, [1930] A.C. 124.

The Mode of Effecting the Changes Proposed.—With excellent judgment the Conference has accepted as adequate the mere passing of Imperial legislation to give effect to the relaxation of Imperial authority. It is quite true that no Imperial Act can, strictly speaking, bind the Imperial Parliament, and that such an Act can be repealed by a simple Act at any time, but common sense shows that a declaration solemnly enshrined in an Act is the most effective and appropriate method of defining relations between the various parts of the Empire. It is interesting to note that the position differs vitally from the attitude adopted in 1782 and 1783 towards Irish claims. There Ireland insisted that only the Irish Parliament had any legal right to make laws for Ireland, and that the British claims of legislative superiority were invalid. Under pressure of force the British Government yielded, first by repealing in 1782 the famous Declaratory Act, 6 Geo. I, c. 5, asserting British legislative and judicial supremacy, and in 1783 strengthened the position by the Renunciation Act recognizing as unquestionable the Irish claim of right to be bound only by laws enacted by the King and the Irish Parliament. No such admission of an inherent right can now be contemplated even as regards the Irish Free State. The procedure now envisaged accords far better with facts, the gradual surrender of the exercise of supreme authority and its transfer amicably, and not under threat of insurrection as in 1780–2, to communities now fully competent to guide their own destinies. The Imperial Parliament and Government will still, consistently with this principle, continue to fulfil the duty of caring for and governing all British subjects in those lands where the Crown still enjoys extraterritorial jurisdiction. The Conference doubtless recognized that no foreign country would consider for a moment the possibility of the Dominions exercising independent authority in this regard, even had the Dominions entertained any such desire.

The Settlement of Inter-Imperial Differences.—The development of Dominion autonomy and the loss of Imperial power to impose any decision on the Dominions evoked by 1914 serious consideration, at least in the United Kingdom, of the possibility of devising some machinery for settling disputes between parts of the Empire.[1] The idea as usual has only slowly been accepted generally, but the Conference has admitted that it is impressed by the advantages which might accrue from the establishment of such a tribunal. From that point of view it proceeded to lay down that the tribunal should take the form of an *ad hoc* body appointed from panels nominated by the several members of the Empire, and that its

[1] Keith, *Imperial Unity and the Dominions*, pp. 165, 166.

jurisdiction should be limited to justiciable disputes arising between Governments. To the former suggestion there can be no special objection; it may be assumed that the Dominions would include on their panels the judges who now are members of the Judicial Committee of the Privy Council, as well as men of political experience and knowledge of government. The latter is unfortunately too vague to be helpful, for the question what is justiciable requires further definition. It is clear that as between members of the same Empire there cannot be applied satisfactorily the rule that matters which fall within domestic jurisdiction cannot be referred to the tribunal. That would mean that the various parts of the Empire stood to one another in the relations of foreign countries, which would be inadmissible in principle and in practice. A tribunal to be of any use must be one to which there could be referred, for instance, such a question as the control of fisheries in Irish waters or the obligations of the Commonwealth and the States under the settlement agreement with the United Kingdom. The treatment accorded to immigrants in Victoria and the cessation by the Commonwealth of immigration under the agreement are matters which might, if such a tribunal existed, be referred to it for a judicial decision. In cases of differences of opinion between the parts of the Empire, it must be assumed that each Government is only anxious to do what is right, and that it is willing to submit its case to an impartial body. It must, however, be recognized that save the Irish Free State no Dominion is likely to be willing to agree to any definition of justiciable issues which would permit any possibility of the policy of immigration restrictions being investigated at the instance of India.

The Status of Newfoundland, the Canadian Provinces and the Australian States.—It is noteworthy that Newfoundland took no part in the Conference, and that none of its recommendations therefore apply to it. The position of the territory is, therefore, somewhat anomalous, for it has been recognized as a Dominion since the Colonial Conference of 1907 and regularly takes part in the Imperial Conference. But there are obvious reasons for its position being left unaffected by the present proposals.[1] The Conference of course had no power to deal with the position of the States or the provinces, and it took care in no wise to encroach on their authority in any degree, expressly providing in the proposed legislation that no authority must be deemed to be given to the Parliaments of the federations to make laws on matters solely within the authority of the provinces or the States. It is clear that the question of applying like principles to these cases may have later to be discussed, but it is also clear that there is hardly any practical point at issue, except as regards the Australian States the power of extending the operation of their criminal statutes and control of intra-state shipping. The fact is eloquent of the wide character of the authority already exercised in fact throughout the Dominions.

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[1] It is not to be included in the definition of Dominion suggested, which also negates the application of "colony" henceforward to a province or state. Newfoundland has already been styled a Dominion in many instruments, e.g. Official Secrets Act, 1920, s. 11 (1).

The Export Duty on Timber in British Columbia.—It is a curious illustration of the fact that an important constitutional issue may only be raised after many years of acquiescence in illegal legislation, that the timber export tax of British Columbia should have been leviable for twenty-six years, before it was successfully attacked in the Supreme Court of British Columbia.[1] The system of taxation was simple; it imposed a tax on all timber cut within the province of a fairly substantial amount, but granted a rebate of all save a nominal amount if the timber were used in the province. The export of timber was forbidden until the tax had been paid. When, therefore, a company desired to export timber to a customer in the United States, permission to export was refused by the customs officers of the Dominion Government, on the score that the company required first permission from the province, and the company then claimed in the Supreme Court of the province a declaration that the statutory provisions imposing the tax were *ultra vires*. It was argued that the tax was an indirect tax, and, therefore, not within the powers of the province, and, further, that it ran counter to the reservation to the Dominion of the power of imposing customs and excise, by ss. 122 and 123 of the British North America Act, and the rule laid down in s. 121 for the free admission into each of the other provinces of articles, the growth, produce or manufacture of any province. It is not surprising that it was held by the Chief Justice and by the Privy Council that the legislation could not stand. Plainly the tax was an export tax, intended not to raise revenue, but to extend the utilization of timber locally. Such a tax was normally and naturally described as a customs tax. Moreover, it was clearly not a direct tax but indirect, for it was not naturally and normally borne by the seller, even if on economic grounds in the present case it might in fact fall mainly or entirely on him, but was taken into account in fixing the price to be paid by the buyer. As a duty of customs and an indirect tax, it was clearly outside the ambit of provincial power, and, therefore, must be ruled to be invalid. The decision, though clearly sound, illustrates the grave inconveniences inseparable from a federal constitution, for it is difficult not to sympathize with the legitimate aims of the province, and the fact that the challenge arose in the interests of export to the United States, not to another province, proves that the other provinces have not felt the British Columbian policy a real hardship.

Criminal Appeals from the Provinces.—A very complex case affecting the powers of the provinces to enact virtually criminal law and the right of appeal from provincial courts arose in *Chung Chuck* v. *The King* and *Wong Kit* v. *The King*.[2] In both cases there was a real point of importance involved regarding legislative power, for the province of British Columbia has made provision in a Produce Marketing Act for the imposition of heavy penalties, including imprisonment, in respect of offences against the terms of the Act, and it was contended that these provisions might be *ultra vires* the province. But the preliminary question was whether the Court of Appeal of British Columbia had authority under the Order in Council of 1911, defining the jurisdiction of the Court in matters of appeal to the Privy Council, to grant special leave. This involved the issue whether (1) the matter in question was a criminal matter, and (2) whether, even if it were, the Order in Council permitted the grant of leave in all matters decided by the provincial courts even if criminal. It is clear that it was really impossible to deny that the matter was essentially criminal, and the conclusion that the Order in Council had no application to matters criminal was not difficult to draw. It is true that the power of the court to grant leave was given in terms sufficiently wide to cover criminal judgments, if the rest of the Order in Council had not required to be taken into account. But the Order in Council clearly deals generally with appeals in civil causes, and in these circumstances it was natural to hold that it was impossible to read the wording in the most general sense so as to cover criminal causes. Nor would the Judicial Committee consent to grant leave of its own motion to appeal, suggesting instead that the view taken of criminal appeals in *Nadan* v. *The King*[1] was hostile to leave being conceded in any case. At the same time it can hardly be held that such a rule can be absolute. The Privy Council bears still the brunt of decision of constitutional issues in the Dominion, and it would stultify its powers if decisions on such issues were to be come to in Canada and rendered immune from appeal because the cases in which they were decided were brought under penal clauses of provincial Acts. Similarly it would be most unacceptable to the provinces if Dominion efforts to encroach on the provincial sphere under the guise of criminal legislation (*e.g.* in insurance issues) were to be left to decision by the Supreme Court merely because the issue took the form of a decision under the criminal law.

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[1] *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co., Ltd.*, 46 T.L.R. 264; [1930] A.C. 357.

[2] 46 T.L.R. 134; [1930] A.C. 244.

The Privy Council and the Irish Free State.—Very difficult issues confronted the Judicial Committee in the appeal of the Performing Right Society from the decision of the Supreme Court[2] that the Copyright Act, 1911, was not in force in the Irish Free State on August 11, 1926, when a band employed by the Bray Urban District Council performed without due authority the musical works *Venus on Earth* and *Lilac Time.* It had been duly held by the High Court that the Act was in force at the date in question, and that, accordingly, the Performing Right Society was entitled to an injunction against the Council, though that body had acted under the belief that the band was duly authorized to perform the music in question. The Supreme Court, however, on appeal reversed the decision of the Court below, and ruled that the Act was not operative at the time mentioned, so that the unfortunate Society became liable to pay a heavy bill of costs to the defendants in addition to its own expenditure. It was, of course, clear that, if this result correctly represented the law, the position in the Irish Free State was absurd, and the legislature hastened to correct the situation by enacting that copyright subsisting in the United Kingdom of Great Britain and Northern Ireland on December 5, 1921, by virtue of the Act of 1911 or any order under it, should be deemed to subsist and always to have subsisted in the Irish Free State. But it added a very important section, under which no relief, whether by way of damages, injunction, costs, expenses or otherwise, should be recoverable by reason of an infringement before the passing of the Act of 1929 of a copyright declared to subsist by that measure. The motive for this section was made quite clear in Parliament. It was known that the Society had obtained special leave to appeal from the Privy Council, and it was the deliberate intention of the Government to secure that the appeal should be rendered useless to the appellants, who thus might be induced to drop further proceedings and thus save the Supreme Court from the experience of the reversing of its judgment. The Society, however, received some degree of support from Lord Passfield, who after a remarkable delay decided to suggest to the Irish Government that the Society's costs might be secured in view of the fact that copyright should clearly have subsisted in the items in question. The Irish Government, however, proved obdurate, and the hearing on the merits before the Privy Council was proceeded with. The defendants pleaded that no appeal lay at all, and that the section of the Constitution providing for it was meaningless, but this contention was hastily disposed of. In fact, the appeal would have lain under the treaty of 1921 in virtue of the assimilation of the status of the Free State to that of Canada, and its insertion in the constitution in express terms was inevitable. The decision is important, because it implies that it will not be possible for the Irish Parliament by simple legislation to abolish the appeal in law, and that Imperial legislation will be requisite, perhaps based on a modification of the treaty. On the merits of the claim that the Act of 1911 was not in force in the Irish State Free after the creation of the Free State as a Dominion, there was little to be said in support of the judgment of the Supreme Court. The chief argument was that the Act did not apply to the Dominions unless adopted by them, but the effort to make out that the Free State was thus automatically excluded on becoming a Dominion was precluded by the fact that the term Dominion was expressly defined in the Act of 1911, and thus had no general application. The Privy Council insisted that the Act was among the existing legislation preserved in operation by Art. 73 of the Constitution, as indeed was the view taken by the Irish Parliament in 1927 when it passed the Industrial and Commercial Property (Protection) Act. In that measure the Act of 1911 was repealed, but with a saving for rights acquired under it before December 6, 1921. A rather desperate argument was used for the defence to the effect that the rights of the Society having been obtained by assignment later than that date were not acquired before it, but this contention was ruled out by the Privy Council which pointed out that, if upheld, it would mean that an author who had not assigned could recover, but assignees would have no remedy. The Supreme Court was thus ruled to have decided erroneously, but its decision was not simply reversed, as this procedure would have ignored the effect of the Act of 1929 in taking away remedies for infringements before the date of that Act. Instead, the order of that Court was simply discharged in so far as it ordered the payment of costs, and there was no order made as to the costs of the appeal. It is possible to sympathize with the Society which has suffered through the error of the Supreme Court a virtual denial of justice, but at least it has been saved from the injustice of payment of costs, and the Bray Council whose action, however innocent in intention, was the prime cause of the litigation, has had to share the suffering imposed by judicial error. The severity of the Irish legislation forbidding the recovery of damages or costs is clear. The Privy Council ingeniously suggested that the insertion of the clause was dictated by Art. 43 of the Constitution, which forbids the Parliament to declare acts to be infringements of the law which were not so at the date of their commission, but it may very seriously be doubted if that article has this wide sense. Rather it is intended to strike at the passing of *ex post facto* criminal legislation, not at the variation of civil rights.

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[1] [1926] A.C. 482.

[2] *Performing Right Society, Ltd.* v. *Bray Urban District Council,* 46 T.L.R. 359; [1930] A.C. 377.

The Maltese Election Petition.—It is easy to understand the reluctance of the Judicial Committee to embark on the troubled waters of Maltese politics, and it was natural that the attempt to induce it to give a definitive interpretation of the meaning of the provisions of the constitution regarding the appointment of members to the Senate to represent the Trade Unions in *Parnis* v. *Agius*[1] should have failed. The Court was content to rule that the matter was governed by the principle of *Théberge* v. *Laudry*[2] despite the fact that leave to appeal had unfortunately been given by the Board in the first instance, although at that time the grant of leave was strongly resisted precisely on the strength of that leading case. It must, however, be noted that the decision goes much further than any previous decision in ruling that local courts have final jurisdiction in electoral petitions. In *Théberge* v. *Laudry* the statute on which rested the jurisdiction of the court expressly provided that its decision should be final. In the case of Malta the constitution contains no such provision. S. 33 merely provides: "All questions which may arise as to the right of any person to be or remain a member of the Senate or the Legislative Assembly shall be referred to and decided by the Court of Appeal in Malta." The word "finally" which appeared in one draft of the clause was not inserted in the final form. Now this clause is not

[1] 46 T.L.R. 194; [1930] A.C. 285.

[2] 2 App. Cas. 102.

isolated in colonial constitutions, and it is clear that, where it appears elsewhere, it is not intended to give a final jurisdiction. For instance the Trinidad and Tobago Legislative Council Order in Council, 1924, contains in s. 21 the rule: "All questions which may arise as to the right of any person to be or remain an elected member of the Council shall be referred to and decided by the Supreme Court of Trinidad and Tobago." In s. 29, on the other hand, it is provided that "every election petition shall be tried before the Supreme Court in the same manner as a suit commenced by writ of summons. At the conclusion of the trial the Chief Justice shall determine whether the member of Council whose return or election was complained of or any or what other person was duly returned or elected, or whether the election was void and shall certify such determination to the Governor, and upon such certificate being given, such determination shall be final." It is clear that the insertion of s. 29 would have been unnecessary if s. 21 conveyed the meaning given to it by the Privy Council in the Malta case, and in fact, whenever election petitions *eo nomine* are dealt with in colonial constitutions, there is inserted express provision for finality of judgments. The Maltese Letters Patent, by having only a general clause, and making no special provision for election petitions, omitted due security for finality, but the Privy Council decision, which unfortunately ignores this point entirely, has fully remedied the omission if it were accidental. It must, however, be remembered that in the case of Malta where racial feeling runs high and strife between State and Church is unhappily present, it may well have been the intention of the framers of the constitution to leave it open to the Privy Council to intervene to decide issues in a calmer atmosphere than that of the Maltese Court of Appeal, and presumably this point of view explains why a very strong Board originally granted leave to appeal.

The Validity of Maltese Legislation.—The decision of the Privy Council has unhappily opened up the question of the validity of the legislation passed in Malta under the procedure of a joint sitting of the two houses of the Parliament, in accordance with the law enacted in 1929, under the authority of the amending Letters Patent of 1928. In order to prevent deadlocks the new Letters Patent authorized the amendment of the constitution to provide for the passage of laws by simple majority in a joint session by a law so passed, and the majority which passed the constitutional amendment included two Senators representing the Trade Union Council of Malta, whose election was pronounced invalid by the Court of Appeal. It has, therefore, been suggested in the Maltese Parliament, and apparently held by the Court of Appeal, that all legislation passed under this constitutional amendment, together with the amendment itself, is invalid. This doctrine involves the view that it rests with the law courts to determine the validity of legislation duly certified by the proper officers of Parliament to have been passed, and duly assented to by the Governor and not disallowed by the Crown, not on the score of repugnancy to Imperial legislation, but merely because the legislature was not duly constituted when the measure impugned was passed. The claim is clearly a far-reaching one, and it is significant that it could not be contended for in respect of the Imperial Parliament.[1] That body alone can determine in each of its houses the right of the members to vote, and no English court could deny the validity of an Act because in its view some members had voted in either House without due qualification. Now the Houses in Malta enjoy by express enactment the privileges of the House of Commons in the United Kingdom, and, if votes are allowed by either House, it seems clear that they cannot be questioned in any law court without an infringement of the privileges of the legislature, which no court is entitled to attempt.

The Suspension of Responsible Government.—If the view of the Court of Appeal was sound, the electoral law on which the elections of 1930 should have been held was invalid, and all proceedings under it would be of no effect. To validate the enactment impugned recourse was had to an Ordinance by the Governor under his authority to deal with reserved matters validating the impugned measures, an action which naturally raised the question whether the Ordinance itself could be deemed to be authorized by the constitution. But the more serious issue remained of the possibility of allowing an election to proceed when the bishops of the island had taken upon themselves with the approval of the Vatican to direct the voters on pain of religious censure not to vote for Lord Strickland on the ground of his alleged hostility to the Roman Catholic Church. It is clear that this was a fundamental question, and that the only possible attitude of a British Government was to refuse to allow intervention of this kind, and to counter the attitude of the Vatican the most obvious step was that duly taken, an alteration of the constitution authorizing the issue of an Order in Council empowering the Governor to assume authority in all matters, pending the possibility of elections under just conditions. The further conduct of the elections had already been postponed by an Ordinance of the Governor under the reserved powers, and the new step secures that during the suspension there shall be due legal authority. To vest that in ministers would clearly have been improper, for the constitution expressly requires that ministers shall be members of the legislature and, whatever powers they may possess *ex necessitate*,[2] in the event of a dissolution pending the meeting of a new

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[1] Cf. *Edinburgh and Dalkeith Railway Co.* v. *Wauchope* (1842), 8 Cl. and F. at p. 723, *per* Lord Campbell. For the views of Sir Thomas Inskip in favour of the claim and of the writer against it see Malta Legislative Assembly Debates, 1930, pp. 295 ff., 545 ff. The issue may ultimately have to be decided, but the Order in Council has removed any doubt as to the validity of the Acts in question. In this case it would have been necessary to establish (1) that the members were not duly elected, and (2) that the courts can annul Acts passed by a majority including such members.

[2] This vital issue, which arises also under the Irish constitution, was discussed in *Parnis* v. *Agius*, but the Judicial Committee avoided any pronouncement on the issue.

Parliament, that would refer merely to a very brief period of an electoral contest, and not to a prolonged suspension such as the present may possibly be. The decision to proceed by Order in Council is, of course, indubitably wise. The power given to alter the constitution by s. 68 of the Letters Patent is ample to justify such action, while, on the other hand, the power to legislate by Governor's Ordinance is of a very dubious character, and was naturally not accepted by the Court of Appeal. If justified, it must rest on the power under s. 12 of the Letters Patent constituting the office of Governor, read in conjunction with s. 41 of the Constitution Letters Patent, to legislate regarding the public safety and defence of the Empire. This power cannot be read as meaning the public safety of Malta in itself, for in that case the Parliament of Malta would be excluded from legislating on that topic, which would be absurd, and the power thus must be restricted to legislation on defence matters, or matters affecting vitally the security of Malta, as part of the scheme of Imperial defence. To extend it to validating laws passed on a miscellaneous series of topics would be a dangerous extension of power, and it is fortunate in the interests of orderly government that reliance has not rested finally on this procedure. The suspension of ministerial authority does not, of course, mean that their advice will not be available to the Governor if he desires it, but it places on him the responsibility, and in any case pending the restoration of Parliament it is clear that nothing of a character much beyond routine administration can be attempted. One point that is especially regrettable has emerged in the controversy, the effort of the Holy See to assert the immunity of priests from civil jurisdiction, a claim justly reprobated by Mr. Amery in the House of Commons as inconsistent with fundamental principles and long since absolutely abandoned in the island itself.

The Simon Report.—An unfortunate series of events has precluded the Report of the Indian Statutory Commission[1] under Sir John Simon receiving the dispassionate consideration which it merited as a bold effort to secure an immediate and effective measure of responsible government for the provinces of India, an accommodation of the claims of the Indian States and of British India, and the opening up of a way to solve the issue of defence by its attribution to the Imperial Government. Dominion history[2] is relied upon as negativing any proposal that British forces should be placed under the control of a responsible ministry in India, and it can no doubt be reasonably argued that if it is legitimate for the Dominions to rely on naval defence by the United Kingdom, India may well rely for frontier defence on British forces, especially if these are paid for in large measure by Indian funds. Yet it is obvious that such forces will have to be assured a large measure of extraterritorial privilege. For the immediate future no great difficulty, of course, would arise under the scheme envisaged in the Report, since it does not contemplate the

[1] Parl. Paper, Cmd. 3568, 3569.

[2] Keith, *Responsible Government in the Dominions* (1912), iii. 1251–6.

introduction of any measure of responsibility in the central government, and would make the governors in the provinces the authority for requisitioning forces to deal with domestic unrest. It is clearly recognized that the introduction of complete responsibility of the central government to a legislature would involve the existence of forces wholly under the control of that government for the purpose of maintaining internal order, though external defence might, and for a time must, probably remain in Imperial hands. This attitude towards the issue of defence is clearly unacceptable to Indian opinion, but it deserves recognition as a courageous attempt to meet the difficulties presented in the demand that the British forces in India should be placed under the authority of a responsible government there. One further point of constitutional importance must be noted, the fact that the Dominions are not to take any part in the discussions with representatives of Indian views which are to follow the Imperial Conference and which, it is hoped, may secure the foundation of a fresh constitutional advance. The position is unavoidable, but it is a sharp reminder of the tendency to disintegration of any sentiment of effective unity in the Empire.

Dominion Disabilities in International Relations.—There is in fact no doubt that the new constitution of the Empire involves the Dominions in certain disabilities, the importance of which cannot be overlooked. The trend of events is shown in the temporary commercial agreement between the British Government and the Government of the U.S.S.R. of April 16, 1930.[1] The most-favoured-nation privileges granted in the treaty apply to British subjects in general, but, by a deviation from the long-established practice, the rights accorded by Art. 3 to British ships and their passengers are expressly denied to ships registered in the Dominions, unless under Art. 4 the agreement is extended to the Dominions by notes exchanged between their Governments and that of the U.S.S.R. India is recognized as in a sense being in the same position as a Dominion, and the right is accorded of action by the Indian Government in the same manner as in the case of a Dominion. But, on the other hand, there is no exclusion of British Indian shipping from the privileges accorded. The situation is further complicated by the fact that the Irish Free State and the Union of South Africa are expressly excluded from the operation of Art. 4, and also of Art. 6, which confers on the Dominions and India the privilege of most-favoured-nation treatment in the U.S.S.R. for their natural produce and manufactures, so long as similar treatment is accorded to the produce and manufactures of the U.S.S.R. subject to the right of the latter to denounce the arrangement. The exclusion of the two Dominions is curious, seeing that both Articles are facultative and advantageous, but it is consistent with the desire not in any way to appear to be concerned with a treaty signed only by the British Secretary of State. One serious obstacle to any Dominion acceptance of the treaty is the concession made of diplomatic status for three members of the Russian Trade Delegation, for Canada has had unpleasant experience of the efforts to smuggle propaganda publications into that territory as part of the baggage of the former Russian trade representative. It is noteworthy that the immunity given is not absolute, for the property of the Union may be liable to proceedings in English courts save in so far as it is immune under international law on the score of being necessary for the exercise of State sovereignty or for the official functions of the diplomatic or consular representatives of the U.S.S.R. The Colonies, Protectorates and Mandated territories, on the other hand, are not required to concede any such immunity to any trade agent sent thither, a very necessary precaution. The Dominions again are debarred from any profit from the fishery agreement of May 22,[1] which opens up to British fishing vessels certain areas of sea which Russia has most unreasonably claimed as territorial waters. Though the British Government reserves the right to reopen the issue of its claims, unquestionably the chance of securing more than is now accepted is minimal, and the Dominions are given nothing. The matter may later be of some importance for Canada as a precedent for the admission of Russian claims.

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[1] Parl. Paper, Cmd. 3552.

Relations with Egypt.—The same independence of action by the United Kingdom is to be seen in the abortive negotiations with Egypt for the conclusion of a treaty[2] to accord to that country a fuller measure of sovereign independence, including the acceptance by Egypt of full responsibility for the protection of foreigners and the rights of minorities. It is true that information was freely given to the Dominions regarding the proposals, but equally plain that, if the Egyptian Government of the time had seen its way to waiving its claims in respect of the Sudan, the British Government would have taken the responsibility of concluding the treaty, even if it had not proved acceptable in its final form to the Governments of the Commonwealth and New Zealand. The new status of the Dominions, therefore, does not avail to afford them any further protection than was accorded to them in these matters under the old procedure, which of course always afforded full rights of consultation to the Dominions in matters which were believed to affect them directly, and in which they evinced active interest. The situation thus is anomalous. The claim that the Empire should act as a unit in foreign issues is not established even as regards British action. The Imperial Government is left free to proceed in important matters, such as the Locarno Treaties, which may ultimately gravely affect the Dominions, without necessarily obtaining Dominion approval. This follows, of course, from the present international status of the United Kingdom as a fully sovereign State, which has never renounced any part of that sovereignty as far as external relations are concerned. Had it concluded the proposed treaty with Egypt, protests by any Dominion would have had no more than domestic concern, and would have been internationally of no consequence. On the other hand, in the case of the Treaty of London on limitation of naval armaments,[1] it was essential to secure the co-operation and positive assent and action of the Dominions, for clearly the United States and Japan alike would never have agreed to any treaty which did not bind the Dominions to the same policy as the United Kingdom. Imperial unity in foreign policy, therefore, for the present is rather due to the pressure of foreign powers than to any tradition of active co-operation among the several parts of the Empire.[2] It is possible to regret this position of affairs, and to wish that Dominion statesmen should take part in deciding the terms to be accorded to Egypt, in order to secure a settlement with that country on a just and abiding basis, such as would put an end to the recurrent violations of the constitution by the King, who ultimately relies on the obligation of the British Government to intervene in order to safeguard the lives and properties of foreigners.

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[1] Parl. Paper, Cmd. 3583.

[2] *Ibid.*, Cmd. 3575.

The Ratification of Treaties.—A rather curious point arose in connexion with the decision of the British Government to re-establish diplomatic relations with the U.S.S.R. It was expressly stated that the steps to be taken would be brought for approval before Parliament, but in fact it was deemed inadvisable to attempt to secure the approval of the House of Lords for the resumption of relations on the terms laid down, and accordingly it was held by the Government that the undertaking given in the protocol of October 3, 1929,[3] was adequately carried out by securing the assent of the House of Commons. It is clear, and indeed it was not denied, that there was an inexactitude in the use of the term "Parliament" in the protocol. The power of the Crown to act in such a matter without the sanction of Parliament is beyond dispute, and when, therefore, mention was made of Parliament in the protocol, it must normally have been held to have the exact sense. An analogous but less serious blunder was made by the Secretary of State for Foreign Affairs on September 19, 1929,[4] when signing the Optional Clause of the Statute of the Permanent Court of International Justice, for he then pointed out that the signature was subject to ratification which would enable the question to be raised in Parliament, before the acceptance of the compulsory jurisdiction of the Court became operative. Needless to say, it was not deemed expedient to ask the House of Lords to approve ratification which was submitted merely to the House of Commons. In both these cases this mode of action was rendered possible and effective because no actual change in English law is brought about by the agreements in question. On the other hand, it was held to be essential to secure legislation to provide for the making effective of the London Treaty of 1930 regarding limitation of naval armaments, though it is interesting to note that the Prime Minister expressed himself as uncertain whether ratification could not precede legislation. It is, however, clear that such a mode of action is undesirable. If legislation is necessary, it ought clearly to be first obtained as a matter of constitutional propriety. No government has a right to inform Parliament that it is bound to legislate, and that failure to do so will expose it to the risk of committing an international wrong, the penalty for which may be enforced by the Permanent Court of International Justice. The doctrine that legislation where necessary must precede ratification was laid down for the Dominions by the Imperial Government in 1895, and the validity of the principle was asserted as against Lord Milner by Sir Robert Borden when he insisted that the Treaty of Peace with Germany must not be ratified pending legislation by Canada. The same doctrine applies essentially to the United Kingdom. It may be taken for granted that the Upper Chamber would never light-heartedly oppose ratification desired by the Lower House and the Government, but it cannot be forgotten that it was the action of the House of Lords which prevented the ratification of the unfortunate Declaration of London.

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[1] Parl. Paper, Cmd. 3556.

[2] It must be noted that the participation of the Dominions in this treaty negatives for its duration their right to secede or remain neutral in war, since thus they would unjustly prejudice the position of the rest of the Empire.

[3] Parl. Paper, Cmd. 3418, p. 8.

[4] *Ibid.*, Cmd. 3452, p. 6.

The Australian Constitution.—Two points in the programme of the Labour Government in the Commonwealth are of special constitutional interest. It is proposed to solve the question of extending the authority of the federal Parliament by securing the deletion of the referendum as part of the means of constitutional change, the people being thus invited by referendum to declare that in future consultation of the electorate shall not be necessary. The immediate result of such action on their part would be efforts at unification and the destruction of the federal constitution. A controversy has necessarily been raised between those who advise the Government that destruction of the federal character of the constitution is within the powers of the Commonwealth Parliament, and those who hold that the constitution must be federal,[1] and that only an Imperial Act would avail to permit the abolition of the federal principle.[2] In the abstract the question is clearly insoluble, and that a concrete issue will arise depends on the possibility of persuading a majority of the voters in a majority of States that the constitution should be made flexible. The practical disappearance of the referendum from the Irish Free State constitution is not much to the point, for in a unitary State like the Free State, constitutional rigidity is of far less meaning than in a federation. The other point raised by Mr. Scullin is the suggestion that the new Governor-General should be an Australian, a selection promoted by the rule adopted at the demand of the Irish Free State in that Dominion. It must, however, be remembered that there is a fundamental difference between the two cases. There was no sentiment in any Irish political section in favour of the appointment of an Englishman to the office of Governor-General, whereas in the Commonwealth the opposition has shown marked hostility to the idea of a former political supporter of the Labour Movement being given an office which ought to be occupied by a person of unquestioned impartiality. Moreover, the unhappy experience of the results of the selection in Queensland of a political partisan as Lieutenant-Governor[1] can be adduced to prove that objections on this score are not merely theoretic and frivolous. General Hertzog also in the case of the Union has firmly opposed his extreme supporters' demand for a South African of their own political point of view as Governor-General. It may, therefore, be held that Mr. Scullin would have done well not to put forward the proposal in question in view of the objections of the opposition, but unquestionably a difficult position will be raised if he insists on pressing the suggestion, and one which will not be acceptable to other Dominion Prime Ministers who realize that their own position may be affected by the adoption of the practice in any Dominion.

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[1] An interesting comparison of Canadian and Australian federalism will be found in Prof. W. P. M. Kennedy's *Some Aspects of Canadian and Australian Constitutional Law* (Cornell University, 1930).

[2] Cf. *Responsible Government in the Dominions* (1927), ii. 689.

Palestine.—The report of the Commission[2] which investigated the rioting in Palestine serves as a painful reminder of the unwisdom of the British Government in procuring a mandate which involves a policy running counter to the terms of Art. 22 of the Covenant of the League of Nations.[3] It is clear that the combination of the creation of a Jewish National Home, and the furthering of the well-being of the Arabs, is practically impossible, and that one or other of these ends will in the long run have to be made subordinate to the other. The evidence of the Commission conclusively proves that the grave error has been committed of permitting Jewish immigration in excess of any reasonable power of absorption, and that in face of all experience the administration has permitted the creation of a landless Arab class to menace the peace and development of the country. The determination to check immigration[4] pending due review of the possibilities of settlement was unquestionably wise, but there remains the issue of creating representative institutions such as are clearly needed and as cannot fairly be denied to the Arab population, which unquestionably acted unwisely in refusing the original proposals on this head. 'Iraq, happily, under the new treaty is assured of a better fate, and of the early withdrawal of British forces, thus carrying out, though at a deplorable cost to the British taxpayer, the true intention of Art. 22 of the League Covenant.

The Constitution of Ceylon.—The decision of the Legislative Council of Ceylon to accept the constitution in the form offered by Lord Passfield[5] was arrived at on December 12, 1929, by a majority of nineteen to seventeen unofficial votes, the official members duly abstaining from participation in the decision. It is impossible to regard so narrow a majority, which included three representatives of European interests, as a very satisfactory basis for the adoption of the new system, and there seems no doubt that two of the Ceylonese members who voted for acceptance did so in deference to the pressure exerted by non-voters rather than at the desire of their constituents. The objections to the changes now decided upon are powerfully set out by Sir Ponnambalam Ramanathan in a memorandum of July 18, drawn up for the consideration of members of Parliament. It must be admitted to be unsatisfactory that such an issue as that of the constitution of Ceylon should be capable of decision without Parliamentary consideration. Nor is it possible to doubt that there is a distinct element of speculation in deciding to entrust the suffrage to adults at age twenty-one without either literacy or property qualifications. It would run counter to all probability if the newly enfranchised voters were not likely to be led to support candidates who are prepared to promise reforms incompatible with economic realities, and it can only be hoped that no serious injury will arise from the errors which must inevitably mark the initial stages of the new form of rule. Whether the Committee system will serve the purposes for which it is designed may be doubted, but it may form a transition to full responsible government on the ordinary model. As in any case the decision is definitively taken, it may be hoped that even those who doubt its wisdom will afford every assistance to the working of a scheme at once complex and novel.

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[1] *Cf. Responsible Government in the Dominions* (1927), i. 134 f., 461 f.

[2] Parl. Paper, Cmd. 3530.

[3] The strictures on British policy of the Permanent Mandates Commission of the League are largely vitiated by failure to realize that the mandate demands the treatment of irreconcilable ends as if they were complementary.

[4] Parl. Paper, Cmd. 3582.

[5] See *Journal of Comparative Legislation*, Third Series, vol. xii, pt. i, pp. 94, 95.

NOTES.

The Maritime Boundary of Queensland.—The modern coast line of Queensland extends from Point Danger on the northern boundary of New South Wales round Cape York and along the shores of the Gulf of Carpentaria as far as the 141st meridian east of Greenwich. At some remote geological period the eastern coast line lay many miles out to sea from the present mainland. Remains of this older coast line can be traced in the numerous islands, coral reefs and shoals lying off the coast at from 15 to 160 miles. These form the Great Barrier Reef which extends from the Swain Reefs in lat. 220 south, to within a few miles of the New Guinea Coast.

Queensland was, until 1859, part of New South Wales. Her original boundaries were fixed by the Crown in the Letters Patent of June 6, 1859, constituting the Colony pursuant to the Imperial Act 18 & 19 Vict., c. 54, by reference to the boundaries of New South Wales. These rest on the original act of possession by Captain Cook in August 1770 and the Commissions issued to the Governor of New South Wales. In these documents New South Wales is described as extending from Cape York to the extreme southern point of what is now Tasmania and including all the country inland westward as far as the 135th east meridian and all the islands adjacent in the Pacific Ocean within the respective latitudes of the north and south extremes.

The boundaries of Queensland are now fixed by the Letters Patent of June 10, 1925, reconstituting the office of Governor of the State of Queensland and its dependencies in the Commonwealth of Australia, comprising the territories and islands described in the recitals.

As this method of description has been adopted, there is no direct delimitation of the present boundaries, and neither the present land boundaries nor the present maritime boundary can be discovered without perusal of the various State documents mentioned in the recitals.

These are: (1) The Letters Patent of June 6, 1859, erecting into a Colony, by the name of the Colony of Queensland, so much of the Colony of New South Wales as lay northward of a line from Point Danger to the 29th parallel of south latitude and following that parallel westerly to the 141st meridian of east longitude, which was the east boundary of South Australia, together with all and every the adjacent islands their members and appurtenances in the Pacific Ocean.

(2) Following on the establishment of the Colony the coast of the Gulf of Carpentaria was examined and it was brought before the notice

of the Queensland Government that a considerable area of country in which Queensland might hope to be interested was outside the boundaries as defined in 1859. In consequence representations were made to the Home Government, and the Letters Patent of March 13, 1862, secondly recited were issued and under them the western boundary was thrown back further west to the 138th meridian of east longitude from the 26th parallel of south latitude northward, and it was expressly stated that all and every the adjacent islands their members and appurtenances were annexed to Queensland. This was taken to include the Wellesley Islands, upon one of which, Sweers Island, a town site was surveyed.

(3) The third recital deals with the islands lying off the east coast of Queensland.

The islands adjacent in the Pacific Ocean had been included in the territory of New South Wales, and under the wide interpretation given to those words in the early years of the history of that territory, jurisdiction was exercised over Tahiti and New Zealand. This was subsequently abandoned. But the jurisdiction of New South Wales was exercised over Raine Island, on the Barrier Reef, lying considerably more than three miles from the Queensland coast line, by the granting of a licence to remove guano. That islands lying off the coast of Queensland should be under the Government of New South Wales was regarded as anomalous and inconvenient. This was admitted when the position was placed before the Colonial Office. As a result, on May 30, 1872, Letters Patent were issued giving the Governor for the time being power over all islands within sixty miles from the coast and empowering him to annex them if it should be deemed advisable.

On August 16, 1872, the Legislative Council resolved that it was desirable that the islands lying within sixty miles of the coasts of the Colony should be annexed to and become part of Queensland and that the Governor should be asked to exercise the powers conferred on him by the Letters Patent of May 30, 1872.

The reason for this resolution, as expressed by the Minister moving it, was that there were several islands to the northward which were at more than three miles distant from the coast—"the present territorial jurisdiction of Queensland," and cases of difficulty had arisen from the doubt as to whether they were under New South Wales or Queensland.

(4) The fourth recital deals with the Proclamation and Deed of Transfer of August 22, 1872, by which effect was given to the Resolution of the Legislative Council, and all the islands lying and being within sixty miles of the coast were annexed to Queensland.

There remained the question of the islands of the Barrier Reef lying outside the sixty-mile limit. Some of these islands were inhabited and were beyond control. It was eventually arranged that these should be annexed to Queensland.

(5) The fifth recital shows how this was carried out. Letters Patent on October 10, 1878, were issued to authorize the Governor to annex the

islands by proclamation on the legislature passing an Act providing that on the proclamation the islands should become part of Queensland. The Act was accordingly passed in June 1879 and, as recited, the islands became part of Queensland on and after August 1, 1879.

The schedule to the Act (Queensland Act 43 Vict., No. 1) sets out the islands so annexed as "lying in Torres Strait and lying between the Continent of Australia and Island of New Guinea that is to say all islands included in a line drawn from Sandy Cape northward to the south-eastern limit of Great Barrier Reefs, thence following the line of the reefs to their north-eastern extremity near the latitude of nine and a half degrees south: thence in a north easterly direction embracing East Anchor and Bramble Cays in a line west by south (south 79 degrees west) true, embracing Warrior Reef Saibai and Tuan (Tauan) Islands thence diverging in a north-westerly direction so as to embrace the group known as the Talbot Islands, thence to and embracing the Deliverance Islands and onwards in a west by south direction (true) to the meridian of 138° east longitude."

The schedule follows the wording of the Letters Patent of October 10, 1878. Whether Raine Island is included is a question of fact.

The next recital relates to the fresh Letters Patent issued on October 29, 1900, rendered necessary by the passing of the 63 & 64 Vict., c. 12 (the Commonwealth of Australia Constitution Act). This document contained no recital of the Letters Patent of October 10, 1878, nor of the subsequent action upon them. This omission was thought capable of supporting a claim that the sixty-mile limit had been removed, although the Letters Patent were the basis of the fishery limits determined by the Act of the Federal Council of Australasia of 1888 (51 Vict., No. 1). The omission was supplied in the Letters Patent of June 10, 1925. The result is that the maritime boundary of Queensland is the coast line from Point Danger to Cape York and thence round the Gulf of Carpentaria to the 138th east meridian, together with the coast line the islands within the outer edge of the Barrier Reef and within a line drawn from the north-western point of the reef to the above-mentioned meridian, as affected by the Territorial Waters Jurisdiction Act, 1878.

F. W. S. Cumbrae-Stewart, K.C., D.C.L.,
Garrick Professor of Law in the University of Queensland.

The Institute of Foreign Public Law and International Law.—The old Palace of the German Emperor in Berlin, the Schloss, is remarkably turned to-day to public and legal uses. It houses a number of Institutes which are concerned with the scientific study of the development of law. A recent number of the *Journal of Comparative Legislation* contained a note on the publications of the Institute for Comparative and Private International Law, which is one of the Associations that occupy part of the Palace; and now there has appeared a majestic publication of another Institute which carries on its activity in the same place. The publication is the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1929, which is issued by the Institute of the same name under the direction of Professor Victor Bruns.[1] It contains over 1,500 large pages, and its scientific contents, its form and its apparatus are a tribute to the thoroughness and method which characterize German scholarship.

The aim of the Institute and of its review is to deal with the most important problems of international law and the public law of the different States from the side both of science and practice. The combination of the two aspects of law, international law and the public law of States, is deliberate. The Institute starts out with the principle that international law is the legal basis of the community of States; in the international society each State is a person similar to the person of the national State who is the subject and object of legal rights and obligations. The right and constitution of the single State are dependent on its position in the union of States according to the legal order. It is the aim of the Institute to secure a genuine international discussion of the most important current problems of the international law; and it is conscious that such problems have hitherto been too much considered and examined within the particular national groups. There are indeed Associations, such as the Institute of International Law and the International Law Association, where the publicists and lawyers of many States meet together for discussion of questions which concern all civilized countries. And international conferences working to lay down practical rules of international conduct are amongst the most remarkable features of our time. But it is remarked with some truth, in the Preface to the *Zeitschrift*, that the international conferences of lawyers have a tendency to avoid the most serious problems of the day, such as the question of reparations, of national minorities, of the new basis of the law of war at sea.

The first volume of the *Zeitschrift* contains, in pursuance of its policy, articles on the Kellogg Treaties by Professor Borchard; on the Commission of Conciliation established by the League of Nations, by Professor Kaas; on the United States and the Allied Debts, by Professor Spykman of Yale; on the theoretical aspects of the international responsibility of States, by Professor Borchard; on certain questions in the Treaty of Versailles; on the relations of Russia and Poland in the nineteenth century; and lastly, on the Anglo-Turkish conflict concerning the Province (Vilayet) of Mosul, by Dr. Elbe. In the division of national law, it contains articles by a Belgian professor on the responsibility in the Belgian law of the administration towards individuals, by an American professor on certain consequences of the system of judicial review, by a German jurist on the system of provided and non-provided schools in England, by a German judge on the question of minority school-rights in Canada, with regard to the recent decision of the Privy Council, by a Swiss professor on a recent Swiss law concerning the rights of administrative officers, and lastly, by a German jurist on the law affecting foreigners in Scandinavia.

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[1] Published by Walter de Gruyter & Co., Berlin.

The mere catalogue of articles shows the catholicity and actuality of the programme of the Institute. The theoretical aspect of international law has also its place in the collection. The guiding article is fittingly written by the Director of the Institute, Dr. Bruns, on the subject of international law as a system of right for the community of States; that is, a system of legal principles, legal rules and legal enactments which are bound up together so as to form a definite system. Another article which concerns the broad principles of international justice discusses the exclusion of the arbitrary in the international relations of States. The writer, Dr. Leibholz, examines the application of the principle from numerous aspects, among them, the objection that has been pressed in recent years to the claims of France to exercise an exclusive protectorate over all Christians in Eastern lands. It is contrary to the general principles of international law to-day that a Protectorate should be founded on the basis of religious creed, or that a Protectorate which has been founded on such a basis should be extended to the subjects of third Powers.

The second volume of the publication contains a most valuable mass of documents, legislative, judicial and diplomatic, which apply and illustrate the principles of international law or of public law. The collection of these documents, as of the articles in the first volume, is most catholic and varied. It embraces the endeavour to bring together the most important acts bearing on these two large aspects of public law, which were issued in the years 1927 and 1928 from the courts and chanceries of the civilized world. Selection of course there has to be; and certain countries, it is noticed, have not been laid under contribution, such as Italy, Turkey, Soviet Russia and Japan, and more remarkably Holland. So far as international courts are concerned, the judgments, with a single exception, deal with cases in which Germany was a party. And naturally the fullest attention is paid to cases in foreign States in which German interests were concerned. In that part of the work the collection is less complete than that in the Digest of Cases of Public International Law which is issued in England under the auspices of the London School of Economics. From courts in the British Empire, however, three important judgments are set out in full: the judgment of the Court of Appeal in the case of *The Fagernes*, concerning territorial waters; the judgment of the House of Lords in the case of *Engelke* v. *Musmann* concerning diplomatic immunities; and the judgment of the High Court of South-West Africa with regard to the succession to the properties of the German Imperial House in that Mandated Territory.

The selection of legislation on matters of public law passed in different countries is interesting. From the British Empire are included (1) three Acts of the Imperial Parliament concerning Royal and Parliamentary Titles, the Trade Disputes Act of 1927 and the Representation of the People (Equal Franchise) Act, 1928; while (2) from the Parliament of the Union of South Africa there are three Acts, the Senate Act, the Union Nationality and Flags Act, and lastly, the Naturalization of Aliens in South-West Africa Act, of which the last has given rise to great discussion before the Permanent Mandates Commission of the League of Nations, on the question whether it is in conformity with the principles of the Mandate.

Of political documents there are included a number of pronouncements with regard to the occupation of the Rhinelands, the Declaration of Sir Austen Chamberlain in the House of Commons and of the Lord Chancellor in the House of Lords in December 1928; and on the other side, the Declaration of the late German Chancellor, Dr. Streseman.

Enough has been said to show the broad purposes and the truly international character of the *Zeitschrift.* It is inevitable, in the present stage of the study of international law, that there should be a considerable amount of overlapping between the efforts of jurists and publicists in the different countries. Everywhere there is a desire to look beyond the limits of one State, and to bring together for comparative study the judicial decisions and the legislation of countries which are members of the Society of Nations. The mass of material threatens indeed to become unwieldy, and something in the nature of a legal clearing-house would appear to be required. That clearing-house could advise as to the scope of the publications of the many Institutes and Societies in such a way as to secure that the whole ground was covered, but was not doubly or trebly covered in whole or in part.

NORMAN BENTWICH.

The Conseil d'Etat.—On reading the stimulating article by Dean Berthélemy in your issue for February 1930 on the *Conseil d'Etat,* two reflections occur to me.

(1) Professor Dicey never expressed a "bad opinion" of the French administrative system. On the contrary, he indicates the weak points alike of the English (*Constitution,* p. 389) and of the French (p. 396) systems.

(2) The author of the article asserts roundly that "everywhere the government gives orders, injunctions, prohibitions" to private citizens. But that is precisely what the Victorian government of England never did. It was the boast of the Briton under Victoria, that he could not be ordered about by any official whatever, from the Queen to a parish constable. Until continental critics can learn to appreciate that solid fact, they will be at a loss to understand the England of the nineteenth century.

T. BATY.

International Academy of Comparative Law.—The Academy has a membership restricted to thirty with the addition of a small number of corresponding members. It is divided into groups—Latin, Anglo-American, Central and Northern Europe, Oriental and Colonial. The Academy meets annually at the Peace Palace at The Hague.

Since its foundation in 1924, it has lost three of its original members, M. André Weiss, its first President, Sir Paul Vinogradoff and Mr. Munroe Smith. In their place have been elected M. Henri Capitant, Sir William Holdsworth and Mr. E. M. Borchard. The President now is M. Antonio Sanchez de Bustamante, Judge of the Permanent Court of International Justice, and the General Secretaries are Professor Elemér Balogh and Professor R. W. Lee. A list of the members is given below.[1]

This year the main business of the annual meeting was the discussion of the arrangements for the Congress of Comparative Law to be held at The Hague on August 2–6, 1932.

The Academy began its publications in 1928 with a stout volume of some 1,200 pages entitled *Acta*,[2] which contains essays on a great variety of subjects by the following members—R. Altamira, G. Cornil, E. Lambert, C. Lyon-Caen, C. Vivante, A. Weiss, R. Pound, M. Smith, P. Vinogradoff, C. Wieland, G. Blanchard, J. Escarra, F. M. Goadby, M. Morand, H. Lévy-Ullmann, E. Balogh, H. Siber, R. W. Lee and F. P. Walton. All students of comparative law will find plenty to read in this volume, but it hardly lends itself to review.

Among its plans for future work the Academy contemplates the publication of a series of studies on the sources of law and the judicial organization of the principal countries, with a bibliography in each case of the codes, judicial reports and the most important commentaries. Of these studies four have already appeared.[3] These are Egyptian law by F. P. Walton, Palestinian law by F. M. Goadby, Chinese law by J. Escarra and Japanese law by Y. Oda.

They contain much information not readily accessible elsewhere, and the idea is an excellent one, though in the nature of things it will be a long time before the series can be completed. F. P. W.

The Flogging of Women.—When we read in our own old criminal trials of women being sentenced to be whipped we are in the habit of saying to ourselves, "Well, that sort of thing at any rate belongs to a past age when England may have been merrier but was certainly crueller." That such a practice should be reintroduced here is frankly inconceivable.

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[1] *Latin group.*—Messrs. R. Altamira, D. Anzilotti, H. Capitant, P. Bonfante, A. S. de Bustamante, H. Lévy-Ullmann, E. Lambert, C. Lyon-Caen, V. Scialoja, C. Vivante. *Anglo-American group.*—Messrs E. M. Borchard, W. S. Holdsworth, E. Jenks, J. B. Moore, R. Pound, F. Pollock, J. B. Scott, H. B. Stone. *Central and Northern Europe.*—Messrs. E. Balogh, K. Hammarsjöld, E. Heymann, I. C. Naber, L. de Petrazycki, H. Siber, K. E. Wieland. *Oriental and Colonial group.*—Messrs. G. Blanchard, F. M. Goadby, M. Morand, R. W. Lee, F. P. Walton. *Corresponding members.*—G. Cornil, J. Escarra, I. Matos, V. M. Maúrtua, Y. Oda, F. Stang, K. Takayanagi, Wang-Chung-Hui.

[2] Berlin, 1928, Hermann Sack; London, Sweet and Maxwell.

[3] *Les Sources du Droit Positif*, Fascicule I, *Orient*, Berlin, 1929, Hermann Sack

But violent evils provoke violent remedies. A correspondent in Japan draws our attention to recent legislation in this matter in Rumania. In that country the form of *crime passionnel* which consists in one woman assassinating another from motives of jealousy became so common that a law was passed making it possible to inflict a sentence of flogging. The effect is said to have been remarkable. In 1920 there were 164 such crimes, and since the flogging law they have come down to eight, which is the figure for 1928. One woman, says a Rumanian paper, had her back pounded into jelly, but 156 persons are now sleeping tranquilly in their beds, who, but for the flogging law, would be in the cemetery. A portion of the French press strongly approves of the flogging law, and one Parisian editor says, "Who will have the courage to propose in the Chamber of Deputies a similar law designed to save 156 lives?"

F. P. W.

Irish Representative Peers.—In a review in this issue of the *Source Book of Constitutional History*, by Professor D. Oswald Dykes, a reference is made to the Irish Representative Peers.

Professor Dykes, in a note on the Irish Free State (Agreement) Act, 1922, says (p. 15): "The political stress of the time may explain the clumsy and slipshod legislation by which effect was given to the arrangement for setting up the Irish Free State; but it can hardly excuse the total failure to deal with the Irish representation in the House of Lords. The Irish peerage is nowhere deprived of its right to elect its representatives as vacancies occur; but by the abolition of the office of Lord Chancellor of Ireland (13 Geo. V, sess. 2, c. 2, Sched. II, 2), through whom alone the necessary writs for an election can be issued (20 & 21 Vict., c. 33, s. 1), the only machinery by which the right to representation can be made effective has been destroyed."

It would be an odd thing if the Irish representative peers were doomed to extinction by a draftsman's error. But can no more probable explanation be suggested? Draftsmen are dumb animals who have to bear in silence many unjust blows.

Considering that this matter was of some public importance, and that the Irish Free State (Agreement) Act was passed only eight years ago, it is singularly obscure. There is a sinister silence about it in the *Hansard* for 1922. Except for a question by Lord Phillimore which never received an answer, we cannot find that the subject was ever mentioned in either House during the long and acrimonious debates on the Free State Bill.

One suspects, however, that it had not escaped the attention of the Government, but that it was thought wiser to leave it to a more convenient season.

An Irish learned friend, who has been kind enough to make some inquiry, expresses the opinion that if the matter had come before the Conference the Irish representatives would have taken up the attitude that it was incongruous to have Irish representative peers in the British Parliament, in which the Irish Free State was not and did not wish to be represented. At the same time, he thinks that if the British representatives had pressed for it the Irish would probably have made no objection, their view being that it was a matter of indifference to them how the House of Lords was recruited. The British point of view probably was that if the election of Irish representative peers was to continue, the peers elected ought to represent Northern Ireland and not the Free State.

But as in the meantime there were twenty-eight peers elected for life representing Ireland as a whole, with whose tenure of office it was hardly feasible to interfere, it was considered best to make no provision for elections for the time being.

On the reform of the House of Lords or on the Greek Calends, whichever date is the sooner (if we may borrow a draftsman's phrase), the question may be reopened and new machinery created for the election of peers to represent Northern Ireland.

At present the vacancies are not being filled up, and the number of Irish representative peers stands now, we believe, at eighteen instead of twenty-eight. F. P. W.

The Catalogue of the Library of the Royal Empire Society.—The Council of the Royal Empire Society are to be congratulated upon undertaking a comprehensive bibliography of books and periodical literature relating to the British Empire, so far as it can be found in their fine collection of more than two hundred thousand volumes. The arrangement is geographical and there is a useful index of authors. The typography is good and clear, though the Librarian, Mr. Evans Lewin, might have had more assistance from the printers' reader in his laborious undertaking. On one opening (pp. 98–9) the Journal of this Society is referred to in at least four different ways, two different citations are given in the table of abbreviations and the name of the late Editor, Sir John Macdonell, is mis-spelt in two places (pp. 66 and 316), while it is correct in the list of authors. The adoption of the dangerous practice that " peers are usually placed under their best-known title and not under their family names " has led to disaster, as it always does. Abbott's Merchant Shipping is known all over the Empire, but few people could give his title by which alone it can be found in the Catalogue. The publication of this fine volume once again stirs the desire for a comprehensive catalogue of all the law books relating to the different parts of the Empire deposited in this and other libraries in London. In the meantime no library in the Empire should be without this invaluable work of reference.

NOTICES OF BOOKS.

THE CONSTITUTION OF THE BRITISH EMPIRE.

WE are indebted to Dr. Michael Rynne for a very complete and interesting discussion of the international status of Ireland.[1] The conclusions at which he arrives are in favour of ascribing to the Dominions a status of the most complete international personality. They are entitled to the right of making treaties in absolute independence, including treaties of peace, of war, alliance and commerce. They can entertain at their own pleasure diplomatic relations with any foreign States. They possess the right to make war and peace, independently of the rest of the Empire. Doubtless they are under obligations of mutual consultation on these issues, but that is a matter affecting internal relations within the Empire, and internationally in no wise derogates from their status. Even in the case of the Irish Free State the special treaty obligations owed to the United Kingdom in matters of defence cannot be deemed to extinguish this absolute sovereign independence. Moreover, the Free State must be regarded as having become a Dominion merely by virtue of the treaty of 1921 which is to be taken as concluded between two sovereign States, the Irish State exercising the old sovereignty of Ireland. The position of the King in the Irish constitution rests entirely on the will of the Irish people, whose agent he is for external affairs. Such a presentation of the facts is, of course, in general accord with Irish views, but it is difficult to accept it as precisely in accordance with facts. The British Government has persisted in asserting that the Irish treaty is not a treaty in the full sense of the term, and that the relations of the several parts of the Empire are not relations governed by the Covenant of the League of Nations. Moreover, the British note to the German Government of June 9, 1929, accrediting an Irish envoy to Berlin still insists that the appointment "would not denote any departure from the principles of the diplomatic unity of the Empire, that is to say, the principle of consultative co-operation amongst all His Majesty's representatives as amongst His Majesty's governments themselves, in matters of common concern." It is laid down that the method of dealing with matters which may arise affecting more than one of His Majesty's governments is to be settled by consultation between the representatives of those governments. It is clear, therefore, that the existing unity of the Empire is still more than a matter of internal concern; the Free State has agreed with the British Government in a formal notification of its existence which involves a recognition of something short of complete sovereign independence. The position is doubtless anomalous and inconvenient in theory at least, and doubtless something may be said for the view that it would have been preferable if republican status and independence had been conceded as suggested by Mr. de Valera in 1921.

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[1] *Die völkerrechtliche Stellung Irlands* (Munich: Duncker & Humblot, 1930). Pp. xii + 435. Price Ms. 23.

Interest in the question of mandates appears unflagging. A general sketch[1] is given by Dr. Aaron M. Margalith, whose work is rather an interesting summary of current discussions than an original contribution to the solution of the many legal perplexities involved in the theory of mandates. Very naturally he concludes (p. 177) that the question where sovereignty resides is not now capable of any definite answer, a fact which accords with the view of the Council of the League of Nations; since the book was written the Union of South Africa has deferred to the League by amending the South-West Africa Railways and Harbours Act, 1922, so as to make it clear that the railways and harbours of the mandated area are held subject to the mandate and not in absolute ownership. Time alone will solve the question of sovereignty, if it is deemed worthy of solution, which General Hertzog denies. The latest (June 30, 1930) of the British treaties with 'Iraq suggests that in a couple of years if the League admits 'Iraq to membership that State will be clearly a sovereign State. But it must be remembered that the United Kingdom, as early as the first treaty of October 10, 1922, frankly admitted the national sovereignty of 'Iraq, and that the abortive treaty of December 14, 1927, expressly recognized 'Iraq as an independent sovereign State. So far as these declarations go, they clearly preclude the British Government from denying that sovereignty can reside in the government of a mandated territory as opposed to the mandatory. In the case of Palestine doubtless the question is insoluble, as the Balfour Declaration precludes the normal solution of the creation of an Arab State. The Emir of Trans-Jordania again exercises an independent government under strict obligations to the British Crown, which place him in a position intermediate between 'Iraq and Palestine.

On 'Iraq itself we have now available two important works by Mr. Charles A. Hooper, of the judiciary of 'Iraq. In the first of these[2] he studies the relation of 'Iraq to the League of Nations, giving in full the texts of the most important documents for the period up to the close of the dispute over Mosul. His objective presentation of the course

[1] *The International Mandates* (London: Mr. Humphrey Milford, Oxford University Press, 1930). Pp. viii + 242. Price 11*s.* 6*d.*

[2] *L'Iraq et la Société des Nations* (Paris: A. Pedone, 1930). Pp. 112.

of events throws a welcome light on a very complex history. In the second [1] he has given us the text of the translation of the Constitutional Law of 'Iraq together with a valuable introduction and many notes which are certainly requisite to explain a document subject to all the defects of attempting to set out in legal form the principles of constitutional monarchy. The King of 'Iraq has inevitably no common law prerogative on which to rely; all his powers are derived from statute, and this fact accounts for certain incoherences. Thus an essential royal power is the selection of the Prime Minister (Art. 26), and under Art. 27 the power must be exercised by royal Iradah, which must issue on the proposal of a minister with the concurrence of the Prime Minister and be signed by the minister. Strictly speaking, this would preclude the King from any freedom of choice of a Prime Minister, though this can hardly be intended.[2] It is, however, clear that the King cannot exercise consistently with law any such powers as have been exercised by the King in Egypt. It must, however, be noted that Mr. Hooper suggests (p. 92) that it is within the King's power to dissolve Parliament himself, without consulting the Council of Ministers, which he rightly regards as a remarkable power. This seems clearly to be a misunderstanding, for the power to dissolve given by Art. 26 must be exercised under Art. 27 by royal Iradah, involving ministerial advice, a practice in entire accord with the general principles of responsible government.

Not unnaturally British constitutional practices have been to some degree adopted without adequate regard to the text of the constitution. Thus it has been decided that minor agreements, not concluded between heads of States in the formal manner of important treaties, need not be presented to Parliament before ratification. This, of course, is a procedure absolutely legal in the United Kingdom where there is no obligation to submit any treaty whatever to Parliament before ratification, though such action may be desirable. But clearly, as Mr. Hooper argues (p. 75), the ministry is wrong in adopting a similar practice in 'Iraq under the constitution, for that accords to the King alone the right to make treaties, and expressly forbids him to ratify them without the approval of Parliament. The rule of the constitution may be inconvenient, but the proper method of evading this, if desired, is by constitutional change, not by clear disregard of the text of the constitution. It is noteworthy that, while the King can declare war on ministerial advice, he cannot ratify a treaty of peace without the assent of Parliament. The distinction is inevitable, as circumstances in 'Iraq clearly might preclude the possibility of awaiting the meeting of Parliament before entering into war.

An effort is made to enforce membership of the legislature by ministers by requiring under Art. 64 that a minister must within six months obtain a seat in one or other House. The effort in Art. 65 to define Cabinet government is not happy, for it is worded so as to convey the impression that the Cabinet deals only with matters affecting more departments than one, and that its decisions are merely recommendations for royal consideration. Neither result, of course, is intended, and we may fairly ascribe to Arab courtesy the fiction of treating the decision of the Government as a mere submission to the King. After all, British ministers still submit for His Majesty's approval their recommendations despite his constitutional obligation to approve them. In both cases there is room for royal advice and warning, though the ministry must have the last word.

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[1] *The Constitutional Law of 'Iraq* (Baghdad: Mackenzie & Mackenzie, 1928). Pp. 277.

[2] The German constitution (Arts. 50 and 53) contains a similar difficulty.

A wide and comprehensive review of the operation of mandates is afforded by Professor Quincy Wright's study of the system of mandates[1] with special reference to problems of international law and international control of administration. This study is rich in matter clearly presented, but it is open to doubt whether it is really worth while citing so fully the many contending views which the mandates system has evoked. The case of the question of sovereignty (Part III) illustrates the wide possibility of argument; there is something to be said for each of the theories adduced, but nothing conclusive in favour even of that accepted by Professor Wright, the view that sovereignty under international law is vested in the League of Nations. Incidentally the author seems not quite precisely to give the view of the Chief Justice of the Union in the case of Christian when he holds that he was of opinion that the mandatory was not sovereign (p. 426). As a matter of fact, the Chief Justice seems clearly to have held that the mandatory had full internal sovereignty though limited external sovereignty, the latter fact being based on the view then held that the Government of South-West Africa was not a sovereign and independent State. Nor does it appear clear that the legislature or the executive in the Union have any doubt on the sovereignty of the Union over the territory, though readiness has been shown to recognize in terms as opposed to action the existence of the mandate. Nor is it possible to accept the account of British treatment of native land rights in protectorates and certain colonies (pp. 416 ff.) as precisely legally correct. It is, however, clear that the view of the Privy Council in the Urtas Spring case[2] results in limiting very narrowly the discretion of the courts in seeking to control executive action or legislation by the local administrations on the score of inconsistency with the terms of the mandates. This is probably inevitable, and it emphasizes the importance of the supervision of the Council and the Permanent Mandates Commission. Many readers will find the discussions in chapters v–viii of the mode and effects of the work of the Commission the most interesting part of the book. There is no doubt that much useful work is being carried out, and one may readily support (p. 587) the author's plea for the furnishing of further information to the Commission, the value of informal visits by its members to mandated areas, even of formal inquiries in any case of grave dissatisfaction with the conduct of the mandatory power, and the giving of greater publicity to the results which are being achieved. It is certainly desirable that, as the Commission works out standards for administration which prove successful in operation, the questions involved should be dealt with generally in conventions for all native areas which might be accepted by powers with control over colonies and protectorates. There is abundant evidence from the reports on mandated territories how much remains to be done to reconcile native and European interests; the excellent principles on this matter laid down by the British Government in 1930[1] would clearly be approved by the author. His statement of the United States claims as regards mandates (pp. 484 ff.) is clear and impartial. The date of completion of the work does not appear, but no note is taken of the grave occurrences in Palestine nor of the final determination of the British and 'Iraq Governments not to proceed with the treaty of 1927.

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[1] *Mandates under the League of Nations* (Chicago: The University Press; London: Cambridge University Press, 1930). Pp. xvi + 726. Price 27*s*. net.

[2] See *Journal of Comparative Legislation*, Third Series, vol. viii, pt. iv, pp. 289, 290.

An interesting review of existing constitutional arrangements in the Crown Colonies and other dependencies is given by Sir Anton Bertram in his lectures on *The Colonial Service*[2] delivered at the London School of Economics. The title is perhaps misleading, as it fails to do justice to the distinctive merit of the work, and suggests a more detailed treatment of administration than is attempted. There is, however, one interesting chapter (iv) on Direct and Indirect Rule, where, though too briefly, an effort is made to set out the strength and weakness of the arguments for the latter system. The whole subject demands the fullest examination from an impartial standpoint, despite the value and interest of the experiment necessarily made by Lord Lugard in Northern Nigeria. The author is inclined to disagree with the suggestion, supported by Lord Lugard, that the African Protectorates should be converted, as in the case of Kenya, into Colonies. The point is not free from difficulty; the term Protectorate has a very natural and proper sense in cases such as those of the Malay States, where the local sovereignties actually survive, and are formally recognized as such by British courts. The position of the Emirs of Northern Nigeria is distinctly inferior, and it is not altogether convenient to use the same term for both, or even to distinguish between Protectorates and Protected States. The fact that full legislative power is exercised over the African Protectorates assimilates them closely to Colonies, and it is not clear whether or not annexation would be objected to by the local chiefs.

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[1] Parl. Paper, Cmd. 3573.

[2] *The Colonial Service* (Cambridge University Press, 1930). Pp. xii + 291. Price 10*s*. 6*d*. net.

In the case of the Gilbert and Ellice Islands annexation has been held locally to be a distinction showing the superior civilization of the islands, as contrasted with the Solomon Islands, over which only a Protectorate is proclaimed. Nor is it clear that there is any real difficulty in applying different forms of administration to a colonial area, and there is a certain absurdity in the fact that Ashanti and Basutoland are Colonies, and the Northern Territories of the Gold Coast and Swaziland Protectorates. On communal representation for electoral purposes Sir A. Bertram's views have been modified by the report of the Special Commission on the Ceylon Constitution; he accepts (pp. 171, 172) the arguments against it in the case of that island, but still adheres to it for Kenya. This view, however, when applied to the essential issue of the franchise of the Indian community, raises a fundamental imperial question, which will become of increasing difficulty with the inevitable progress of India to Dominion status. It is, on the other hand, impossible not to sympathize with the view[1] that the new constitution reluctantly accepted by Ceylon errs in not making the Board of Ministers proposed a real Cabinet. The Committee system certainly does not appear to promise sufficient effective authority for the satisfactory conduct of the affairs of so great a government. Nor is it clear why the Attorney-General should be deprived of so fundamentally useful a function as that of drafting legislation, even if as an impartial authority he may properly be entrusted with the control of electoral machinery. One may also share the author's doubts regarding the project of closer union in East Africa (pp. 257–9). It may be noted that even in the case of South-West Africa, which is permitted to be administered as an integral part of the territory of the Union of South Africa, the Mandates Commission has queried the decision to work the railway system as a unit of the South African system, and that the issue of the degree of sovereignty possessed by the Union is still under debate and may be elucidated by reference to the Permanent Court of International Justice. Certainly it seems from the point of view of defence that the creation of a unified force will present serious difficulties in view of the terms of the mandate for Tanganyika. In a second edition one may hope to find some further note taken of Mauritius and the Seychelles, and of the function of the Judicial Committee of the Privy Council in preserving the high standard of the judicial action of the colonial courts.[2] It may be noted also that the projected legislature for Palestine (p. 264) was to have been on the basis of indirect election of the non-official members, not of nomination, and on p. 132 a reference to the West African Court of Appeal Order in Council, 1928, seems needed.

A. BERRIEDALE KEITH.

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[1] For a similar view see *Journal of Comparative Legislation*, Third Series, vol. xi, pt. i, p. 119.

[2] See the unusual action of the Committee in virtually acting, despite disclaimers, as a Court of Criminal Appeal in the murder charge, *Knowles* v. *R.*, [1930] A.C. 366. Contrast *Atta Mohammad* v. *King-Emperor*, L.R. 57 Ind. App. 71.

ENGLISH SOCIAL AND POLITICAL THINKERS.[1]

In this book Dr. Murray passes in review those English writers who have occupied themselves with social and political questions from Bentham to the present day. Probably very few who have any claim to come within this class have escaped him. His method is to group his authors into chapters round such outstanding names as Bentham, Carlyle, Mill, Spencer and Maine. A glance at the index will afford ample evidence of the wide field over which the author roams: the less considerable authors like J. F. Stephen, Cornwall Lewis or Benjamin Kidd are all given at least a line or two. Moreover, Dr. Murray does not confine his attention to our own shores: something is said also of such American or Canadian writers as Mr. Lippmann, Professor MacIver and Miss Follett. A reader who desires an introduction to any of the principal figures will find here a list of the works by and upon them, a concise summary and some sensible and sympathetic criticism of their views, and a varying amount of interesting biographical gossip. The author has read extensively and, though he rarely goes far below the surface, his book is uniformly informative and entertaining.

Dr. Murray has probably enjoyed writing the book, for he rarely lingers over anything in which he is not clearly interested. He has not set out to give a systematic interpretation of the political and social philosophy of the past century, but to communicate to others some of his own zest for his authors. He can rarely resist a temptation to digress into any topic that takes his fancy: at one time it is an enumeration of the great names of Ulster, at another the relations between French and English culture, at another the "solitariness of genius." He is fond of drawing more or less happy parallels between English and foreign writers—Voltaire and Bentham, Tolstoi and Ruskin, De Tocqueville and Bryce. It is easy to criticize his arrangement and judgment. We are carried so rapidly from one view to another that the general impression gained from reading the book is likely to be one of breathlessness and incoherence rather than of steady development; but this is probably inevitable in a work of this character, which brings together, sometimes in the same chapter or even the same page, writers of such varying views. Important and unimportant works are not sufficiently distinguished, and "thinker" is treated as synonymous with "writer." Bryce is given more space than Maitland and considerably more than Dicey, and the biographical matter is occasionally trifling and irrelevant.

Lawyers as such will turn with interest to those chapters in which Dr. Murray deals with writers on the relation of the State to the Law. Unfortunately it is here that the book is least satisfactory. For it is generally in the realm of legal theory that recent English thought has been most influenced by continental thinkers, and Dr. Murray, who is obviously not particularly interested in legal questions, has been content to base his account of writers like Savigny and Gierke upon second-hand information. Perhaps it would be too much to ask the group theorists who talk so freely of Gierke's famous book on the German *Genossenschaft* to have read or even to have seen that work, but it may be worth while to point out that it is inaccurate to say that it was published in 1868: the third and most important volume appeared in 1881 and the last (incomplete) as late as 1913. The tract on Althusius came out in 1880, not in 1913 as Dr. Murray states. And if French and German writers are still for the most part "realists," their realism is no longer that of Gierke and Maitland. Again, it is to be feared that most readers, whether lawyers or laymen, will be more mystified than enlightened by the account given here of the Free Church of Scotland case. A small but significant inaccuracy in the Index is the confusion of the Dean of the Harvard Law School with the poet of the same name.

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[1] *Studies in the English Social and Political Thinkers of the Nineteenth Century*, by Robert H. Murray. 2 vols. (Cambridge: Heffer. Price 12*s.* 6*d.* net each volume.)

J. W. J.

JURISPRUDENCE OF THE JEWISH COURTS IN EGYPT.[1]

DR. GOODENOUGH seeks to establish that the *De Specialibus Legibus* of Philo contains, when rightly interpreted, valuable information as to the law actually applied in the Jewish courts in Egypt under the early Roman administration. In thus attributing historical importance to Philo's discourse upon the law he differs from the views of previous scholars. His thesis is, however, maintained with adequate learning, and his conclusions will certainly need to be carefully considered by all future students. With great industry and ingenuity Dr. Goodenough essays the task of selecting those statements of Philo which have practical interest as indicating the extent to which the law of the Torah was modified in actual application by Greek and Roman legal ideas. It is possible that future discoveries of papyri may enable the conclusions of Dr. Goodenough to be checked, but, in our present state of knowledge, confirmation is difficult. Dr. Goodenough may, in any case, be congratulated upon a very scholarly piece of work.

His book is of considerable interest, also, from a wider point of view. If he is right, the Rabbinical law was in process of adaptation in Alexandria to the then modern conditions. The conditions of life in the Near East during the last century have offered a new field for experiments of this nature. Unhappily from the point of view of the student of social development, the immense prestige of Western law and the urgency of legal change have prevented any serious attempt being made along the lines of adaptation. Local reformers and legislators have had recourse to a simpler though less interesting policy and have imported European law and legal organization. As a result, Rabbinical and Moslem law retain their application only in family relations, except that the Moslem Civil Law of Obligations, slightly modified in substance, still rules in Cyprus and the mandated areas. Perhaps no other policy was possible ; had circumstances, however, permitted, one would have preferred to see the older law gradually adapt itself under the influence of a judicial reception of European ideas. Traces of a process of this nature are discernible in the treatment of the Moslem Law of Obligations in Cyprus and Palestine. Is it too much to hope that the Rabbinical courts in Palestine may temper the older Jewish ideas of marriage and inheritance ? If Dr. Goodenough is right, there was a considerable reception of Greek and Roman law in the Jewish courts in Alexandria ; such a reception by the religious courts of to-day would do much to ease and perpetuate its application under present-day conditions.

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[1] *The Jurisprudence of the Jewish Courts in Egypt as described by Philo Judæus,* by Erwin R. Goodenough, D.Ph. (Yale University Press, 1929.) Pp. 268.

F. M. G.

PARLIAMENTARY AND PRESIDENTIAL GOVERNMENT.[1]

In the new series entitled *Bibliothèque Constitutionnelle et Parlementaire Contemporaine*, which is appearing under the editorship of Professors Joseph Barthélemy and Mirkine-Guetzévitch, the first volume (now in the press) is to be *La Crise de la Démocratie Contemporaine*, by M. Joseph Barthélemy. In the meantime the work here reviewed has appeared as Tome II of the series.

It is a rare chance to get the constitution of a country described by one who was virtually its author, and as head of the State had very special opportunities of seeing how the constitution worked in practice. This book gives a lucid account of the constitutional history of Chile in recent years, with an analysis of the constitution of 1925 and of the author's theory of government which is in fact embodied in that constitution. The ex-President is a strong champion of personal liberty, of the freedom of the press and of complete religious toleration. He contends, however, that parliamentary government as we understand the term is unsuited to Chile and proved a lamentable failure while it existed there. Indeed, he maintains that this form of government does not suit the genius of people of " Latin " race.

The Constitution of 1925, in establishing in Chile the *régime présidentiel* adopted in his view the best form of constitution for the country. Under it there is a complete separation between the legislature and the executive. Ministers are appointed by the President and cannot be members of either Chamber, but they can when they choose appear and take part in debates. They are not responsible to Parliament.

In dealing with the recent political history of Chile the writer can speak with authority and would be entitled to say *et quorum pars magna*

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[1] *Parlementarisme et Régime Présidentiel*, by Arturo Alessandri, ancien Président de la République du Chili. (Paris : Sirey, 1930.) Pp. xvii + 163. Price 20 francs.

fui. In his references to our parliamentary system his touch is less sure. He says (p. 26) that its characteristic and essential feature is "*un équilibre absolu des deux pouvoirs la Couronne* (*ou Exécutif*) *et le Parlement*" and that this balance is secured by the power of the *Exécutif* to dissolve Parliament. In spite of the distinguished foreign publicists whom M. Alessandri cites, we do not think that this description corresponds with the realities of the situation. But these are slight blemishes. It is a valuable book for the student of constitutional law.

F. P. W.

BRITISH CONSTITUTIONAL HISTORY.[1]

PRESENT-DAY students of constitutional history and constitutional law are much to be congratulated on having at their disposal collections of cases and statutes the want of which was a serious handicap to their predecessors.

Only last year[2] we had occasion to review the work by Messrs. Keir and Lawson, which was the first collection of cases in constitutional law which can be considered as really satisfactory.

The book before us by the Professor of Constitutional Law and Constitutional History in the University of Edinburgh calls itself a "Source Book of Constitutional History," but it covers inevitably some of the same ground. Such subjects as the prerogatives of the Crown, the privileges of Parliament, the status of the Dominions and so forth, belong both to law and to history, and the present law is only comprehensible in the light of the past. But these two books, which it is natural to compare with one another, are quite different in scope and are mutually complementary. It is instructive to notice that of the cases reported only about half a dozen (including such landmarks as *Campbell* v. *Hall* and *Entick* v. *Carrington*) are common to both, and a large part of Mr. Dykes's book consists not of cases but of statutes or excerpts of statutes from 1660 to 1927.

All students of the subject, young or old, will rejoice to have collected together such statutes as the Acts of Union with Scotland and Ireland, the Parliament Act, 1911, the Constitutions of Canada, Australia, South Africa and the Irish Free State, to mention only a few of the most important of the statutes given in this book. It is a pity that it does not include the Constitution of Northern Ireland.

The Introduction of fifty-eight pages gives, under headings such as the Revolution Settlement, Parliament, Church Law and Religious Toleration, Colonial and Imperial, Personal Liability and Habeas Corpus, a rapid summary of the history.

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[1] *Source Book of Constitutional History from* 1660, by D. Oswald Dykes, K.C. (London: Longmans, 1930.) Pp. xi + 505. Price 21*s*.

[2] Third series, vol. xi, pt. iv, p. 297.

On p. 13, in stating the effect of the Irish Appeals Act, 1782, it would be appropriate to give a note explaining that the right of appeal to the House of Lords was restored eight years later by the Act of Union, and on p. 23 it would have been well to explain in what way elections in the eighteenth century were "controlled" by the King.

The note on p. 15 suggests that the Irish representative peers are going to be allowed to die out owing to the carelessness of the draftsman. Malice aforethought seems more probable, but the matter is singularly obscure. It will be referred to in a note in this issue. Mr. Dykes's book will be extremely useful.

F. P. W.

THE ENGLISH CONSTITUTION.[1]

THIS volume appears in the English Heritage series. Our English heritage, in the view of Lord Lee of Fareham and Mr. J. C. Squire, includes, among others, such diverse treasures as cricket, the public school, the English inn, Shakespeare and the Bible, though as to the last, to claim it *telle qu'elle* seems rather a bold stroke.

But that the English Constitution forms part of our heritage none will dispute, and we should like to see a volume on the common law as well. To this most able and readable sketch the Lord Chief Justice gives an introduction. We have here in a small compass a sound and clear exposition of the main principles and institutions which form the English Constitution of to-day. The author believes that the moving spirit of the Constitution is to be found in a certain characteristic of the English mind which can best be described as attachment to law. In this he agrees with Macaulay, who says in one place that "profound reverence for law and prescription has long been characteristic of Englishmen." There is a good deal to be said for this claim as regards England, though not so much as regards Lowland Scotland. Not their warmest admirers would make such a claim for the Highlands before the eighteenth century. In Ireland there have generally been many who, like Black Andie, were "no just exactly what ye would ca' extremists for the law," and though the common law was transplanted to the United States, this devotion to legality would appear to have been lost on the voyage.

Sir Maurice lays stress on those parts of the Constitution which are of the most practical moment, and, to take one example, his remarks on the Cabinet secretariat are full of actuality. Particularly good also is the chapter on the King. The work gains by the fact that its writer for many years contemplated the English Constitution from a distance and was able to discuss it with foreign lawyers. Bagehot in his day swept away many cobwebs and showed the Constitution as a working machine, and this book helps to bring our knowledge up to date.

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[1] *The English Constitution*, by Sir Maurice Amos. (London: Longmans, 1930.) Pp. 194. Price 3*s*. 6*d*. net.

It is really a pity that there is no index nor even a detailed table of contents.

We think Ihering would be surprised to find himself described as an Austrian.
F. P. W.

THE CONSTITUTION OF BRITAIN AND THE BRITISH EMPIRE.[1]

THIS book forms one of a series on much the same plan as our Home University Library, consisting of monographs by specialists on the literature, philosophy, science, art and public law of various countries.

This volume is extremely well done. It gives a brief but excellent account of our constitution and of its history, and within its narrow compass manages to compress not only an astonishing amount of useful information but also many judicious reflections.

An English reader turns naturally to these in order to notice the points which strike a foreign observer. The author is impressed by the manner in which in changing times the Crown and the aristocracy in England have managed to keep touch with the people. He thinks that in spite of the obvious unfairness of our electoral system, we have been wise to avoid proportional representation, the introduction of which into Germany has been in his opinion "an unfortunate experiment" (p. 34). He notices the decline in the political influence of the land-owning class, and is not blind to the fact that in the past that class has done great service to the State both in Parliament and in local administration. He suggests that it is in great part to them that we have for a long time had so much less officialism than continental States. The tendency, however, is now towards the increase of the powers of the central government. On this and on other matters there is much in the book to interest English readers.
F. P. W.

INTERNATIONAL LAW.

THE author of this book[2] professes to have analysed more than two hundred of the leading American and English decisions ranging for a period of one hundred and fifty years with the view to furnishing "a guide for future use in the determination of cases and controversies." As a collection of cases and references the monograph will be found useful. Mr. Hervey has grasped and put lucidly before the reader the essential aspects of the problem. The chapters on Recognition by the Political Departments, the Juristic Status of Unrecognized Governments, the

[1] *Der englische Staat der Gegenwart und das britische Weltreich*, by Otto Koellreutter. (Breslau: Hirt, 1930.) Pp. 136. Price 3.50 R.M. (*Jedermanns Bücherei*.)

[2] *Legal Effects of Recognition in International Law*, by John G. Hervey, LL.B., Ph.D. (Philadelphia: University of Pennsylvania Press. London: Humphrey Milford, Oxford University Press, 1928.) Pp. 170. Price 12*s*. 6*d*.

Retroactive Effect of Recognition, Recognition and Legal Capacity, and on the Extraterritorial Operation of Acts of Recognized and Unrecognized Governments are especially illuminating. It may, nevertheless, be doubted whether the book can be recommended as a reliable guide for students and practitioners. The author's style seems at times to be too exuberant to allow a satisfactory formulation of legal rules. There is also a certain lack of accuracy both in references and in the statement of the facts and the principles underlying the cases dealt with by the author. The *Jupiter* cases—Mr. Hervey insists in referring to them as the *Juniper*—are a typical instance. The Conclusions at the end of the monograph are a not too well-balanced mixture of statements of the existing law and of suggestions *de lege ferenda.* Thus, for instance, the fourth conclusion of the author is as follows: " Recognition is retroactive in its effects. It validates all the official acts of the recognized government, or state, which have been performed within its jurisdiction since the 'commencement of its existence.' The writer concludes that this is too ambiguous and that it would be advisable for the political departments to present their 'diary of events' with reference to a government in question to the courts and allow the courts on the basis of these facts to decide in each case before them whether the government in question had 'commenced its existence' at the time the acts in litigation were committed." There is much to be said for the author's approval of the recent practice of the New York Court of Appeal, which held that effect should be given to the acts of the unrecognized Soviet Government of Russia so far as such a course is required by demands of justice. But he weakens his plea by submitting that " the refusal of the courts to give full effect to such decrees appears to conflict with the rule which holds that the courts of one state will not sit in judgment on the acts of another state, but the latter rule is based on comity and is therefore not applicable to unrecognized governments. Moreover, the law is more than logic."

Errors in spelling are not infrequent, but whereas it does not matter much whether the name of the plaintiff is Terranzas or Terrazas, it is irritating to find Mr. Hervey referring to the distinguished Swiss publicist as Revier.

H. L.

GUARDIANSHIP OF INCAPABLES INCLUDING SPENDTHRIFTS AND " BORDER-LINE CASES "[1]

THE Eugenics Society, presided over by Sir Bernard Mallet, is to be congratulated on having produced a study which is as timely as it is valuable. The fund generously supplied by an anonymous benefactor has been well employed. The title given to what is too modestly called a "pamphlet" is somewhat misleading. The inquiry has a wider scope than "Family Council Law." In England, Scotland, the Netherlands and Scandinavia, as to all of which countries information is given, no such institution as the family council exists, while in Germany it has practically ceased to function. What the book seeks to do is to give a conspectus of the laws of France, Germany, Italy, the Netherlands, Scandinavia, Scotland and England as to the guardianship of "minors and weak-willed persons." There is much to be said in favour of amendment of our law, especially in regard to the admission of border-line cases to mental homes and for creating some machinery for the protection of persons whose will has become so enfeebled by alcoholism, by drug-taking or otherwise, that they are not fit to manage their own affairs. Nor does there seem to be any strong reason why an English "prodigal" should be left free to ruin his family as well as himself, whereas in France and Germany such characters may be checked in their career by the appointment of a guardian. We doubt if there is much likelihood of our legislators being persuaded into introducing into our law family councils on the French model. The family council is a venerable institution of the customary law of continental Europe.[1] But it is probably too foreign to bear transplantation. The modern German law, on the other hand, as to which there is an instructive chapter in this book, deserves the careful consideration of those who are interested in the matter, and these ought to be numerous. F. P. W.

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[1] *Family Council Law in Europe,* issued by the Eugenics Society, 20, Grosvenor Gardens, S.W.1. Pp. 86. Price 3*s.* 6*d.*

THE INTERNATIONAL INSTITUTE OF PUBLIC LAW.[2]

THIS international body, constituted rather more than two years ago, includes among its members many of those who are most eminent in the branch of law with which it is concerned, such as, to mention only a few, Messrs. Jèze, Berthélemy, Jenks, Lawrence-Lowell, Roscoe Pound, Goodnow, Stier-Somlo, Thoma, Triepel and Jellinek. Its President is M. Gaston Jèze and its General Secretary Mr. B. Mirkine-Guetzévitch.

This, the first annual volume of its proceedings, contains a great deal of interesting matter.

The doctrinal part consists mainly of several studies from different points of view of constitutional guarantees, including the discussion of the ever-vexed question whether it is expedient to entrust to a court of law the competence to pronounce a law to be unconstitutional. This subject will be referred to in a note in our next issue.

The papers presented on this matter by Professor Kelsen of Vienna and by Professor Jèze, the President of the Institute, were discussed, and we particularly admire the skill with which these discussions have been summarized. Instead of dull minutes such as are common in such cases, we have here bright and, one might almost say, dramatic dialogue. There follow two critical studies, both excellent, of the work of Léon Duguit, an original member of the Institute, and of Maurice Hauriou. M. Achille Mestre draws attention to the fact that Hauriou, who was for nearly half a century a professor of law at Toulouse, was able to exercise a large influence in shaping the French *droit administratif*.

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[1] See Brissaud, *Manuel d'Histoire du Droit Français*, vol. ii, p. 1164. Calisse, *History of Italian Law* (*Continental Legal History Series*), s. 369, p. 604. Cosack, *Lehrbuch des Deutschen Bürgerlichen Rechts*, sixth ed., vol. ii, p. 699.

[2] *Annuaire de l'Institut International de Droit Public.* (Paris: Les Presses Universitaires de France, 1929.) Pp. 603. Price 75 francs.

The second and longer part of the *Annuaire* consists of documents, viz. constitutional laws passed in the different countries in 1928 and brief notes of the principal decisions on constitutional points. Among the most important of the laws are the new electoral law in Belgium, the Organic Law of Finland, the law in Greece as to the *Conseil d'Etat*, the Italian laws as to the Chamber of Deputies and as to the Fascist Grand Council and the new constitutions of Lithuania and Venezuela. The new French law as to parliamentary indemnities is worth noting. Senators and deputies now receive 60,000 francs a year, equivalent to about £480—a very considerable salary by French standards and considerably more than that of a *conseiller à la Cour de Cassation*.

There is a useful appendix by the Editor of the Almanach de Gotha giving statistics of legislative chambers and of the electorate for 1928 in almost all the countries of the world. The figures for Great Britain fail to take account of our Franchise Act of that year (18 & 19 Geo. V, c. 12), though a summary of that Act is given elsewhere in the *Annuaire*.

F. P. W.

LAW IN THE MAKING.[1]

THE first edition of this book was reviewed at some length in 1928.[2] The present edition is a thorough revision, bringing the work up to date and containing a few slight amendments and changes which make it seventeen pages longer than its predecessor.

It is the freshest and most vigorous book in this field of law which has appeared for many a long day.

In a few places (*e.g.* pp. 17 and 23) it would be a convenience if Professor Allen would give chapter and verse for his citations.

"Hobbian," a monstrous formation, for which, however, there is plenty of old authority, is stated by the O.E.D. to be obsolete. Can Mr. Allen give it a new lease of life? Shall we be able to speak of a "Hobbian" innings?

Mr. Allen continues to be too diffident to dedicate his book to the memory of Vinogradoff. We hope he will do so at latest when the tenth edition comes out.

F. P. W.

[1] *Law in the Making*, by Carleton Kemp Allen. (Oxford: The Clarendon Press.) Pp. xxiii + 405. Price 21*s*. net.

[2] Third series, vol. x, pt. i, p. 148.

CHINESE PENAL CODE.[1]

WE have to thank the *Institut de Droit Comparé de Lyon* for another valuable publication. Apparently, in China it is not true that *inter arma silent leges*. In the midst of turmoil the Chinese Republic has produced a Penal Code which is here translated into French by M. Jean Escarra, who furnishes a long introduction.

Professor Pierre Garraud, the well-known specialist in penal law, writes an interesting preface in which he points out that in new criminal codes the general part tends to be much the same everywhere. The centre of interest is the treatment of specific offences.

Unlike Turkey, which has adopted a foreign law *holus bolus*, the Chinese have made an effort, while profiting by Western codes, to preserve some, at least, of their own traditions. This is seen, for example, in the great weight laid on the institution of the agnatic family and the worship of ancestors. Penalties for some offences are aggravated when committed against relations within certain degrees, and especially for such offences as disturbing funeral rites or violating tombs (Arts. 262 *seq.*). On the other hand, the Code shows anxiety to fight against the social disorders of the time and to deal severely with brigandage, piracy, kidnapping, the sale of women, gambling and the fabrication, sale or smoking of opium (Arts. 271 *seq.*).

Another offence special to China is terrorization by petty tyrants of villages called here *oppresseurs locaux et mauvais notables*, as to which there is a special *Règlement* (p. 126).

From the technical point of view M. Garraud assures us that the Code has considerable merits. M. Escarra says the Chinese are *criminalistes de génie* (p. xliv).

As a specimen of careful drafting we may give the articles on intention and negligence, and on ignorance of the law.

Art. 24.—*Un acte non intentionnel n'est pas punissable.*

Art. 25.—*La négligence n'est punissable que si elle est déclarée telle par une disposition spéciale.*

Art. 26.—*Il y a intention, lorsque le délinquent a sciemment et volontairement provoqué la réalisation des éléments constitutifs de l'infraction.*

L'intention est presumée lorsque le délinquent pouvait prévoir qu'il réaliserait les éléments constitutifs de l'infraction et que, d'autre part, cette réalisation n'était pas contraire à sa propre volonté.

Art. 27.—*Il y a négligence, lorsque le délinquent, bien qu'ayant agi non intentionnellement, n'a pas pris les précautions qu'il devait et qu'il pouvait prendre, d'après les circonstances.*

La négligence est presumée lorsque le délinquent, bien qu'ayant pu prévoir la réalisation des éléments constitutifs d'une infraction, a cru en toute sincérité que cette réalisation n'aurait pas lieu.

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[1] *Code Pénal de la République de Chine.* (Paris: Giard, 1930.) Pp. lxxx + 214. Price 40 francs.

Art. 28.—*La responsabilité pénale ne peut être écartée à raison de l'ignorance des dispositions légales ou réglementaires, mais la peine applicable peut être reduite de moitié, d'après les circonstances.*

F. P. W.

SURVEY OF ENGLISH LAW FOR 1929.[1]

This is the second year of this very useful publication. It is a thoroughly sound scheme carried out with the high degree of competence to be expected of its contributors. It ought to appeal to a wide public, including foreign students of English law.

It is increasingly difficult to keep abreast of the reports and the legal periodicals, and here we can find an account of most of the important cases, of the statutes which are of general interest, of the new books which deserve notice, of selected articles from the legal journals and of the international conventions to which H.M. Government has been a party during the year.

Professor Gutteridge justly observes: " It seems to be one of the defects of modern parliamentary government that legislatures have no time to devote to law reform unless it is of extreme urgency and unless any proposal for change has been definitely agreed upon in advance " (p. 127). This might be illustrated by *Pearce* v. *Brain* (p. 162), *Cotter* v. *National Union of Seamen* (p. 180), *R.* v. *Laws* (p. 194) and, for the law as to contributory negligence can hardly be regarded as satisfactory, by *Dew* v. *United British Steamship Co.* (p. 119).

From the comparative point of view it is interesting to draw attention to the fact that on the important matter of the legality of confiscations by the Soviet Government the French *Cour de Cassation* (*Chambre des Requêtes*) has arrived at an opposite conclusion to that reached by the House of Lords in *Princess Paley Olga* v. *Weisz* (p. 222). The French case is *Req.* 5 *Mars* 1928, Clunet 1928, 674.

F. P. W.

POST-WAR EUROPEAN INSTITUTIONS.[2]

The first edition of this book appeared only in 1928 and was reviewed in our volume for last year.[3] The fact that a new edition has already been called for indicates sufficiently the usefulness of the work. It gives in French the text of the post-war constitutions with a general introduction and a summary bibliography.

The new edition contains the amendments to the constitutional texts since the last edition, and gives for the first time the group of laws which form in effect the constitution of Italy under the Fascist regime, the new constitutions of Jugo-Slavia, Hungary, Dantzig and the Vatican city, and the important new laws which have modified the constitutions of Soviet Russia and of Austria.

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[1] *Annual Survey of English Law*, 1929. London School of Economics. Pp. 277.

[2] *Les Constitutions de l'Europe Nouvelle avec les Textes Constitutionnels*, 2me ed., by B. Mirkine-Guetzévitch. (Paris: Delagrave.) Pp. 565. Price 23 francs 50 c.

[3] Third series, vol. xi, pt. iv, p. 303.

The book is a miracle of cheapness and will be most useful. It should appeal to a wide public. F. P. W.

A COMPARATIVE STUDY OF MODERN LAWS.[1]

THIS very valuable work, previous instalments of which have been reviewed earlier,[2] is progressing satisfactorily. Since our last review four fascicules have appeared, bringing the work down to *Fahrnisgemeinschaft* (community of property between spouses).

Among the specially important titles in these numbers are *Eisenbahntransportgeschäfte* (carriage by railway). *Erbbaurecht* (superficies, emphyteusis), *Erfindung* (inventions), *Ersitzung* (acquisitive prescription) and *Fahrniserwerb vom Nichtberechtigten* (possession of moveables). The book will be of great service, and it ought to be better known in this country than it is. F. P. W.

BIBLIOGRAPHY OF FRENCH LAW.[3]

THE four volumes of this invaluable bibliography covering the publications from 1800 to 1927 were reviewed earlier.[4]

This is the annual supplement for the year 1929. It is greatly to be wished that we had something like it for English lawbooks and books on political economy.

We have also to acknowledge:[5]

The International Protection of Industrial Property. By Stephen P. Ladas. (London: Mr. Humphrey Milford, Oxford University Press.) Pp. xiii + 972. Price 35*s*. net.

The Divorce and Separation of Aliens in France. By Lindell T. Bates. (London: Mr. Humphrey Milford, Oxford University Press.) Pp. 334. Price 35*s*. net.

A Treatise on the Doctrine of Ultra Vires. By Howard A. Street. (London: Sweet & Maxwell, Ltd.) Pp. xxxviii + 591. Price £2 10*s*. net.

[1] *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes*, herausgegeben von Dr. Franz Schlegelberger. (Vahlen: Berlin.)

[2] Third series, vol. xi, p. 304.

[3] *Bibliographie Générale des Sciences Juridiques, Politiques, Economiques et Sociales*, by A. Grandin, 3me Supplément, Année 1929. (Paris: Sirey.) Pp. 186. Price 35 francs.

[4] Third series, vol. x, pt. iv, p. 344.

[5] Mention here does not preclude a later review.

The Roman Law of Marriage. By Percy Elwood Corbett. (London: Mr. Humphrey Milford, Oxford University Press.) Pp. xii + 254. Price 15*s.* net.

Statutes, Treaties and Documents of the Canadian Constitution, 1713–1929. Edited by W. P. M. Kennedy. 2nd ed. (London: Mr. Humphrey Milford, Oxford University Press.) Pp. xxviii + 752. Price 26*s.* net.

The Indian States. By Sirdar D. K. Sen. (London: Sweet & Maxwell, Ltd.) Pp. xii + 234. Price 10*s.* net.

An Outline of International Law. By Dr. Julius Hatschek. Translated by Prof. C. A. W. Manning. (London: G. Bell & Sons, Ltd.) Pp. viii + 364. Price 16*s.* net.

The Revival of Natural Law of Concepts. By Charles Grove Haines. (London: Mr. Humphrey Milford, Oxford University Press.) Pp. xiii + 388. Price 21*s.* net.

Tenure of Office under the Constitution: A Study in Law and Public Policy. By James Hart, Ph.D. (London: Mr. Humphrey Milford, Oxford University Press.) Pp. ix + 384. Price 16*s.* net.

Air Power and the Cities. By J. M. Spaight, C.B.E., LL.D. (London: Longmans, Green & Co., Ltd.) Pp. ix + 244. Price 15*s.* net.

The Annual Register: A Review of Public Events at Home and Abroad for the Year 1929. Edited by M. Epstein, M.A., Ph.D. (London: Longmans, Green & Co., Ltd.) Pp. xiv + 164. Price 30*s.* net.

A Collection of Nationality Laws of Various Countries as contained in Constitutions, Statutes and Treaties. Edited by Richard W. Flournoy, Jr., and Manley O. Hudson. (London: Mr. Humphrey Milford, Oxford University Press.) Pp. xxiii + 776. Price 20*s.* net.

The British Year Book of International Law, 1930. (London: Mr. Humphrey Milford, Oxford University Press.) Pp. 285. Price 16*s.* net.

Maritime Trade in War: Lectures on the Freedom of the Seas. (London: Mr. Humphrey Milford, Oxford University Press.) Pp. 114. Price 6*s.* net.

The History of the Law of Primogeniture. Tagore Law Lectures, 1925. (Calcutta: University of Calcutta.) Pp. viii + 558.

The English and Empire Digest. Vol. 45, Consolidated Table of Cases A–L. Pp. xv + 1292. Vol. 46, Consolidated Table of Cases M–Z. Pp. xi + 2458. (London: Butterworth & Co.)

De l'Influence du Mariage sur la Nationalité de la Femme. By Trink Dink Thao. (Paris: Librairie Recueil Sirey.) Pp. xvi + 244.

La Juridiction de la Cour Permanente de Justice Internationale dans le Système des Mandats. (Paris: Rousseau & Cie.) Price Frs. 40.

L'Echange gréco-bulgare des Minorités éthniques. (Lausanne: Librairie Payot & Cie.) Pp. 217. Price Frs. 4.50.

Le Régime des Passeports et la Société des Nations. (Paris: Rousseau & Cie.) Pp. xiv + 226. Price Frs. 35.

Internationales Verwaltungsrecht. By Dr. Karl Neumeyer. (Munich : J. Schweitzer Verlag.) Pp. vi + 390. Price R.M. 27.

Bibliographie der rechtsvergleichenden Literatur d. Zivil- und Handelsrechts in Zentral- und Westeuropa u.i.d. Vereinigten Staaten von Amerika 1870–1928. (Berlin : Franz Vahlen.) Price R.M. 12.

Deutsches Strafrecht, Band II. By Dr. Robert V. Hippel. (Berlin : Julius Springer.) Price R.M. 42.

The following periodicals are also received ; American Bar Association Journal ; American Journal of International Law ; American Political Science Review ; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque ; Bolletino della Emigrazione ; Bulletin de la Société italienne pour les Etudes de Droit industriel ; Bulletin officiel du Congo Belge ; Bulletin statistique de la République Tchécoslovaque ; Calcutta Weekly Notes ; Canadian Bar Review ; Chinese Social and Political Science Review ; Columbia Law Review ; L'Egypte Contemporaine ; Gesetzgebung und Rechtspraxis des Auslandes ; Gold Coast Review ; Headway ; Hindustan Review ; Instituto Ibero-Americano de Derecho Comparado publications ; International Labour Office Bulletin ; International Labour Review ; International Review of Agricultural Economics ; International Year Book of Agricultural Legislation ; Journal du Droit International (Clunet) ; Journal of the Parliaments of the Empire ; Juridical Review ; La Giustizia Penale ; La Procedura Penale Italiana ; Law Quarterly Review ; League of Nations Journal ; Madras Law Journal ; National Municipal Review ; New York University Law Quarterly Review ; Rapports Judiciaires de Quebec ; Revista de Ciencia Juridicas y Sociales ; Revista de derecho jurisprudentia ; Revista de Identificacion y Ciencias penales ; Revue de Droit International et de Législation Comparée ; Revue Internationale de la Croix Rouge ; Revue Internationale de l'Enfant ; Social Sciences Quarterly ; South African Law Journal ; Studi di Diritto Industriale ; University of Illinois Studies in the Social Sciences ; Wisconsin Law Review.